IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-117

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

EDWARD MITCHELL, HOWARD N. SHEPHARD, CALVIN T. REDDEN, JAMES T. OAKES,

Plaintiffs

VS.

BENJAMIN E. CARMICHAEL, Commissioner of Education of the State of Tennessee; MILTON P. RICE, Acting Attorney General and Reporter for the State of Tennessee; THE LINCOLN COUNTY QUARTERLY COURT, composed of LYLE M. FRANKLIN, W.F. PHILPOT, JOE D. TAFT, FRANK E. GRAHAM, HOWARD CAPSHAW, HOWARD MONKS, V.H. BARNES, BILLY PARKER, PAUL BARHAM, CECIL ELLIS, PANGLE STEWART, WM. R. CARTER, FRED YOUNG, J.T. WYATT, WM. S. JAKOVINA, HERMAN MONTGOMERY, L.C. CURTIS, JOHNNY STEVENSON, H. PARSONS, JR., FREEMAN TOWRY, DR, T.H. BULLINGTON, KNOX STEWART, CECIL COOKE, CLYDE FORRESTER, ROY SWEENEY, CON. S. MASSEY, E.C. COLLINS, THOS. E. HUDSON, MELVIN HOWELL, J.T. WALKER, LEONARD MANSFIELD and EARL VANN; TAYLOR CRAWFORD, County Judge and fiscal agent of Lincoln County, Tennessee; the Board of Education of Lincoln County, Tennessee, composed of ERNEST PENDERGRASS, BRIMAGE L. SMITH, WM. T. MEDLEY, JAS. W. SMITH, R. E. BURROUGHS, C.H. HARDY, TULLY BUCHANON, WM. D. JONES and JOHN T. TOWRY; RICHARD WAGGONER, Administrator of the Lincoln County School System, the Board of Education of the State of Tennessee composed of NOBEL C. CAUDILL, T.M. DIVINE, JOHN K. FOLGER, THOMAS E. GERAGHTY H. LYNN GREER, JR., JAMES W. HAWKINS, EDWARD L. JENNINGS, HUGH T. MCDADE ANDREW J. PAYNE, JR., MRS. C. LENTZ STEVENS, F. THORNTON STRANG, MS. DORIS B. TANNER, BENJAMIN E. CARMICHAEL, STEPHEN DENNIS, GEORGE H. BARNES, KENNETH EZELL, DALE GLOVER, JAMES H. JONES, JR., EDWIN H. KENNEDY, FRANK TAYLOR and GOVERNOR WINFIELD DUNN.

Consolidated with

Edward Mitchell, Howard Shephard, Calvin T. Redden, James T. Oakes

VS

(**Same Defendants** except County Judge Taylor Crawford is named as primary defendant instead of Benjamin E. Carmichael Commissioner of Education)

PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented for Review	2
Constitutional and Statutory Questions Involved	7
Statement of the Case	7
Argument	13
Conclusion	54
Appendix A	A.1

Authorities Cited

TENNESSEE CODE ANNOTATED

	Page
16-617 (4)	14
23-1101	14-A.14
23-1103	A.14
16-625	14
20-210	14-A.13
20-211	14-A.13
23-1107	14-A.15
23-2003	15
53-3422	16
53-3417	16
53-3415	16
27-120	18-52-A.4
16-330-1-23	A.3, A.4
49-701-2	20-6-9-A.6
49-713	20-A.7
5-1001	20-1-3-6-7-8-9-50
5-1024	A.15
49-201 (5)	21-2-3-5-6-7-8-9-50-51A-4
1-303	28
5-1024	27-8
49-102	30-A.6
49-214	30
49-215	30
49-224	30
49-1105	30-A.8
49-105	31-36-A.9
49-604 (B) 1, 2 and 3	31-A.12
49-602 (E) 9 and 10	32
49-1105	36
23-1113	48
17-202-3	53
49-711	A.8
16-624	26-A.13
16-617	A.13

CASES

Shelby County Board of Commissioners v. Shelby Quarterly Court
216 Tenn. 470, 392 S.W.2d 935 (1965) 14

Jack's Cookie Corp. v. Giles County
219 Tenn. 131, 407 S.W.2d 446 (1966) 14

Chamberlin v. State ex rel Scott W. Brown
387 S.W.2d 816 14

Delta Loan Finance Co. v. Long
206 Tenn. 709, 336 S.W.2d 5 14
Adams v. State ex rel Chattanooga Coke
514 S.W.2d 424 15
State ex rel Harbin v. Dunn
39 Tenn. App. 190 18-23
State ex rel v. Safley
172 Tenn. 385 19-23-50
Blonder-Tongue Labs v. University Foundation
402 U.S. 313, 329 19
Crewse v. Beeler
186 Tenn. 475 20-50
State ex rel Harned v. Meador
154 Tenn. 634 22
State ex rel v. Nashvill Baseball Club
127 Tenn. 292, 307 24
Pollack v. Farmers Loan and Trust Co.
157 U.S. 429, 15 S. Ct. 673, 39 L Ed. 759 24
State v. Mathews
143 Tenn. 475, 13 ALR 314 24
Winters v. American Trust
158 Tenn. 479, 14 S.W.2d 740 24
State ex rel Lea v. Brown
166 Tenn. 669, 91 ALR 1246 24
K V O S Inc. v. Associated Press
299 U.S. 269, 57 S. Ct. 197, 81 L Ed 183 24
Katzenberger v. Weaver
110 Tenn. 620 25
Illinois Central R.R. Co. v. Memphis
21 Tenn. App. 327, 110 S.W.2d 352 25
Burns v. Duncan
23 Tenn. App. 374 25
Wilds v. Coggins
496 S.W.2d 496 (1973) 27-50
Board of Park Commissioners v. Nashville
134 Tenn. 612, 629 28
Prescott v. Duncan
126 Tenn. 106 34

Schecter Poultry v. U.S.
295 U.S. 495, 44 S. Ct.837, 79 L Ed. 1570 34
Malone v. Williams
118 Tenn. 390 35
Garner v. Scales
183 Tenn. 577, 194 S.W.2d 452 37
State v. Yoakum
299 S.W. 635 38
Cheatham v. Baker
161 Tenn. 222 38
Citizens to Preserve Overton Park v. Volpe
357 F. Supp 846 (1973) 38
Railroad v. Lee
95 Tenn. 388 38
Sanders v. Carmichael
527 S.W.2d 92 (1975) 44-49
Colburn v. Chatt
2 Shannon 22 (Tenn.) 45
Reams v. Mayor and Board of Aldermen of McMinnville
155 Tenn. 222 45
Pierce v. Society of Sisters
268 U.S. 510 47
Barnette v. West Virginia
63 S. Ct. 1178, 319 U.S. 624 47
Buntin v. Crowder
273 Tenn. 398, 118 S.W. 2d 221 48
Williams v. American Plan Corp.
216 Tenn. 435, 392 S.W.2d 920 48
Engle v. Vitale
370 U. S. 421 48
Flast v. Cohen
392 U.S. 83 48
Evers v. Dwyer
358 U.S. 202 48
Southern v. Beeler
183 Tenn 272, 195 S.W.2d 857 50
Lamb v. State
338 S.W.2d 584, 207 Tenn. 162 51

Joint Anti-Facist Refugee Committee v. McGrath
341 U.S. 123 52
Osborn v. Bank of United States
9 Wheat 738 52
Scott v. McNeal
154 U.S. 34-46 53
Estes v. Texas
381 U.S. 532, 543 (1965) 54
In re Murchison
349 U.S. 133 (1965) 54
Mayer v. Chicago
404 U.S. 189 (1971) 54
Gibson v. Berryhill
U.S. 36 L Ed 2d 488 (1973) 54

INDEX TO APPENDIX A

Constitution of the United States
Page
Art. IV, Section 4 .....13-34-A-1
Amendment 14 .....34-A-1

Constitution of Tennessee
Art. XI, Section 17 13-34
Art. II, Section 17 20
Art. II, Section 2 .....23-A-2
Art. II, Section 1 .....34-A-2
Art. I, Section 8 .....35-A-2
Art. I, Section 1 .....44-A-1
Art. VI, Section 11 .....53-A-3
Art. I, Section 2 ..... A-1
Art. I, Section 5 ..... A-2
Art. I, Section 21 ..... A-2

APPENDIX B (Separately bound)

OTHER AUTHORITIES

Tenn. Rules of Civil Procedure 1208 .....17-A.16
Sedgewick, "Construction of Statutory and Constitutional Law" 28-9
Black-Interpretation of Laws 29
Vanderbilt Law Review, Vol. 24, p. 289 48

PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

OPINIONS BELOW

Only one Opinion has been officially reported in these cases: *Mitchel et al vs. Carmichael et al 522* SW2d *869*. The other opinions of the Supreme Court of Tennessee and the opinions of the Chancellors of Davidson, Lincoln and Giles County of Tennessee are included in the Appendix in accordance with Rule 23 (1) (a) and (i) of this Court.

JURISDICTION

(i) The interlocutory and final orders and decrees sought to be reviewed herein were entered in the following chronological order:

Mitchel vs. Carmichael: an opinion entered in Davidson Chancery; an Interlocutory Opinion by the Supreme Court of Tennessee March 31, 1975; an Opinion of the Supreme Court of Tennessee April 15, 1976 (now styled *Mitchel et al vs Ingram et al)*

In *Mitchel et al vs Crawford et al:* an Opinion by the Chancellor of Lincoln County Tennessee *(reproduced the opinion of the Court of Appeals of Tennessee and a Final Decree entered July 14, 1975;* an Opinion by the Court of Appeals of Tennessee Filed *January 30, 1976;* an order of the Supreme Court of Tennessee denying a Writ of Certiorari from the Court of Appeals April 5, 1976; and an order in the Supreme Court of Tennessee denying a re-hearing April 19, 1976; all of which are in the Appendix along with related opinions.

(ii) The decree of the Court of Appeals of Tennessee January 1, 1976 is the principal opinion on the merits of *Mitchel vs. Crawford*. The Opinion of the Tennessee Supreme Court on a Writ of Error from the Chancery Court of Davidson County is the principal opinion in Mitchel vs.

Carmichael (Ingram). An Order of March 15, 1976 in the Supreme Court of Tennessee granted an extension of time within which to seek Certiorari and Super Sedeas to remove Mitchel vs Crawford from the Court of Appeals to the Tennessee Supreme Court.

(iii) This Court has jurisdiction of this petition pursuant to the provisions of 28 U.S.C. 1257 (3)

QUESTIONS PRESENTED FOR REVIEW

(1) Under the Declaratory Judgment Act of Tennessee, are the requirements of due process of law satisfied, where the Court is duly requested to interpret the constitutionality of specific act (T.C.A. 49-201) by properly defined classes of Taxpayers, Parents, and Children, and the Court, instead of citing precedent wherein the Act has been discussed and evaluated, relies entirely on precedent which does not mention the Act or its *specific* subject matter?

(2) Have the requirements of due process been met where the Court by "remand" removes a suit from the trial court (where by all existing precedent the suit was properly brought) and which presides in the official situs of the principal and real defendant, to another trial court on the theory that the principal defendant (The Commissioner of Education of Tennessee) can "waive" the question of jurisdiction, when the rules of Tennessee Procedure (TRCP 12 .08) specifically prohibits the waiving of jurisdiction by any defendant?

(3) Is a case founded on contract rights (wherein a school teacher under the tenure act sought to name the Commissioner of Education as a party defendant, and this was denied because her contract was, not with him, but the local board of education) — is such a case precedent by any known rules of Stare Deciscis for denying standing to sue to a class of Taxpayers, Parents, and School Children seeking relief under the Declaratory Judgement Act? Is such

limitation on Standing to Sue equal protection of the law?

(4) May the above arbitrary fixing of forum by the Supreme Court of Tennessee be justified by an announcement from the bench that it is done under the "new powers" of the Court where new powers may be created and assigned only by constitutional amendment? And there has been no constitutional amendment but only four acts passed by the legislature (TCA 16 - 330, 16- 331, 16-332, 16-333 (Appendix A. pp 3-4)?

a) The justice who made the above announcement, before his election to the Supreme Court, was president of the Tennessee Bar Association which organization was chiefly instrumental in the passage of the above four pieces of legislation; after remand of *Mitchel vs. Carmichael* to Lincoln County Chancery, a Petition to Re-hear and a Motion to Re-cuse, as to Justice Henry, (the former advocate for Giles County in *Young vs. Warf)* was filed; (April 9, 1975) On May 5 the petition to Re-hear was denied and Justice Henry failed to, or refused, to re-cuse himself; the order of denial was signed "Per Curiam"; has due process here been served? (see Tennessee Court Article VI Paragraph 3 Appendix A 3 and Opinion on Petition for rehearing Appendix B 78).

(5) Has due process been fairly served where one of the justices in a previous suit on the same basic legal questions from another county had been employed by that county as special counsel to argue the case before the Supreme Court of Tennessee? And the former advocate, now Justice, not only fails to recuse himself but joins in and apparently writes an opinion herein (Appendix pp. B 74) which was so highly critical of Petitioners and their counsel that the Opinion could fairly be presumed to have a prejudicial effect on the trial court? Upon final appeal and argument Justice Henry did sua sponte recuse himself (though a motion had been timely filed asking his recusal).

b) After Justice Henry absented himself from the bench was the Court properly constituted when under Tennessee law whereby the Governor is required to appoint a successor in order to have a constitutional Court of five members? (Appendix A-3)

(6) May an Appellate Court effectively ignore and fail to discuss fourteen cited errors of the trial court which are here briefly outlined:

Error No. 1: The learned Chancellor erred in failing to recognize that the County or local School Board has exclusive power to determine school policy (paragraphs 15,16,17 & 22 of Motion for New Trial).

Error No. 2: The learned Chancellor erred in failing to recognize that the Commissioner of Education is an appointee of the administrative department, whose duty is to serve the local School Board, and in all questions of money the Commissioner of Education has fiduciary duties which require full revalation of all factors impinging upon the expenditure of money. (Paragraphs 1, 2, 3, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26 of Motion for New Trial; Tr. P. 164 11 6-10)

Error No 3: The learned Chancellor erred in failing to apply T.C.A. 49-201 (5) which imposes a duty on the County Court to call a referendum in regard to questions of bond issues for new schools, (Paragraph 4 of Motion for New Trial; Tr. p. 13, 1 19; p. 139) and conceived that he had no authority to require a referendum (Tr. P. 110 11 20-21) and was not interested in improper influence on referendum rights (Tr. P. 139, 1s 20-21).

Error No. 4: The learned Chancellor erred in failing to consider or admit testimony regarding children's welfare and parental preference even though children and parents are parties to this cause (Paragraphs 7,8, 10 of Motion for New Trial, Tr. P. 227, 11s 1-2 — all the testimony of Plaintiffs expert witness).

Error No. 5: The learned Chancellor erred in failing to recognize that citizens and taxpayers who are parties to this cause have a right to challenge decisions of elected boards of administrative agencies where there is an abuse of discretion, or a failure to consider alternatives; (Paragraphs 9 & 21 of Motion for New Trial, Tr. P. 90, 1 10).

Error No. 6: The learned Chancellor's refusal to hear or admit into testimony pertinent facts as to taxpayers; (Tr. P. 27, P. 44, P. 67, 1 14, 18) Petitioners (Tr. p. 23, 24) and children (Tr. P. 67 1 14, 18) constituted *a denial of due process.*

Error No. 7: The learned Chancellor erred in refusing to admit petitions signed by some 4,000 eligible voters and addressed to the County Court and seeking a bond issue referendum; these petitions were ignored by the County Court and not answered or replied to. (Tr. P. 23 1 9, P. 24 1 4)

Error No. 8: The learned Chancellor erred in failing to take notice of the compelling and unrebutted testimony of Mr. Pendergrass, long time School Board member (12 years), including 1973, and former Chairman, that: 1) Under the "comprehensive" school plan there would be more bussing (Tr. P. 16, 1 17), that it was educationally unproductive (Tr. P. 70, 1 11;) 2) The Commissioner of Education's office never justified the "comprehensive" school on its merits, if any (Tr. P. 70, 1 21); or compare them to community schools (Tr. P. 74, 1 24); but the commissioner kept insisting on the "comprehensive" school (Tr. P 70, 11 16-18).

Error No. 9: The learned Chancelor erred in refusing to admit the testimony of School Principals Buford Beadle and Joe Vann (Tr. P. 107, 1 7); (Tr. P. 90 1 10); the Court did not comprehend that the testimony of the school principals went to the question, "Was there an independant study by the School Board of rational and supportable alternatives to the "comprehensive" school? Was the community itself

consulted on the desirability of a community school? Their answer was "no".

Error No. 10: The learned Chancellor erred in disregarding the compelling and unrebutted testimony of Squire Thomas Walker of the Lincoln County Court that: 1) The Court was dictated to (Tr. P. 109 l 16, P. 115 l 19) and "had no choice" (Tr. P. 121 11 19-22, P. 130 11 13-16) and that the court was deceived about costs (Tr. P. 133 11 2-13).

Error No. 11: The learned Chancellor erred in refusing to allow interrogotories to be taken of a prominent national authority on education who would testify that there is a valid controversy between the centralized comprehensive school concept and the local community school concept and that no rational decision could be made regarding any given county unless a specific study was made of that county including ascertaining the desires of the parents; (Tr. P. 144 l 15) the error is even more apparent in light of testimony by Dr. Hunter of the Commissioner of Education's office that no such studies were made in Lincoln County (Tr. P. 149 11 14-15) (150-152); Nor were bus route studies made (Tr. P. 172 l 12-17).

Error No. 12: The learned Chancellor erred in failing to grasp that this lawsuit was not just about a school building but about children, parents, taxpayers, and *people* (Tr. P. 177 l 15-17, P 190 11 13-25, P. 191 11 1-7).

Error No. 13: The learned Chancellor erred in failing to pursue to a conclusion the question, "Why, under the community high school plan the county would get *no* vocational aid money, whereas under the "comprehensive" school plan the county would get $2,000,000.00?" (Tr. P. 218 11 9-10, 11 23, P. 219-220 to l 15).

Error No. 14: The learned Chancellor erred in leaving the court room and missing all of the testimony of Plaintiffs expert witness having to do with the existence of a serious controversy in the educational world as to the claimed merits of a centralized comprehensive school as opposed to local

community schools and the lack of study of this question in Lincoln County (Tr. P. 227-230).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent texts of the constitutional and statutory provisions involved are printed in Appendix A hereto pursuant to rule 23 (1) (d) of this Court. They are:

Constitution of the United States: Article IV and the Fourteenth Amendment ¶ 1.

Constitution of Tennessee: (all contained in Vol. 1 Tennessee Code Annotated). Article I Sections 1, 2, 5, 8, and 21; Article II Sections 1, 2, 3, 17 and 29; Article XI Section 17; Article VI Section 3.

Tennessee Code Annotated: Volume 9, 49-201, 49-701 (main Vol. 1966 replacement) 49-102 (1975 Supplement); 49-602 (1975 Supplement to main volume); 49-702 (main volume); 49-713 (1975 supplement); 49-1105 (1975 supplement); 49-105 (in main volume and in 1975 supplement); 49-604 (B) (1975 supplement); *In Volume 2 A* (1975 Supplement) are found 5-1001 and 5-1024; In *Volume 2* is found 1-303 which was formerly Section 13 of the 1932 Code referred to in *State vs. Safley 172 T 389.*

Volume 2, 4-404; *Volume 4,* 16-617, 16-624; 16-625; 16-330; 16-331; 16-332; & 16-333; 20-210; 20-211; *Volume 5,* 23-1107; 23-1101.

The Tennessee Rules of Civil Procedure Rule 12.08 is specifically involved.

STATEMENT OF THE CASE

The Two cases under review here are inextricably involved with three other cases which are referred to in Opinions and Orders herein.

Therefore an accurate assessment of the facts will require knowledge of these cases.

The large and persistent question in all these cases is, "Do Taxpayers and Parents of a given County have constitutional and statutory rights whereby they may have their day in Court to defend their right to a school policy determined by their local school board, free from dictation by the State Commissioner of Education, where they, and the local school board, desired to maintain local community schools, and the Commissioner of Education desired to impose (through his power to control State monies) a centralized consolidated school served by a fleet of buses?"

In 1970 Taxpayers of Giles County Tennessee filed suit in Davidson Chancery Court (Davidson County being the official residence of the Commissioner of Education the real defendant) seeking a Declaratory judgement as to the constitutionality of the Education Act of Tennessee and the manner of its administration by the Commissioner; also in question was the legality of the manner in which the County Court floated school bond issues and the right of the Taxpayers to petition the County Court in an effective manner; that is could the Court re-write a valid petition for a referendum on a school bond issue, a valid subject for referendum, so that it became (as a resolution on the floor of the County Court) a petition for a vote on school policy (Consolidated School vs Community Schools) and hence a non-binding and empty gesture.

The style of this case is *White vs. Warf.* filed June 22, 1970 (Appendix B-1 Complaint and Amendment)

Defendants demurred saying that Complainants lacked standing to sue.

Complainants amended their Bill to add Parents as a class of parties-Plaintiff and the Giles County School Board and the State School Board as parties-defendant.

But this amended complaint (filed September 4, 1970), through clerical error, was never served; nor answered; nor considered by the Court.

The Chancellor allowed the demurrer and dismissed.

The case was appealed direct to the Supreme Court of Tennessee. Justice Creson affirmed in an Opinion (Appendix B20) filed January 17, 1972 in which he discussed the standing of Taxpayers to sue. There was no discussion of Parent's standing. He ruled that the Taxpayers failed to allege that any acts committed by defendants were "illegal" and that this defect was "fatal". This is the sole point decided.

A new group of citizens (Taxpayers and Parents) approached the same counsel (who is counsel for Plaintiffs in all these cases) and a new suit *Young vs Warf* filed May 17, 1972 (Appendix B27, Complaint and Amendment) which very thoroughly alleged illegalities and defined two classes of complainants—Taxpayers and Parents and named the local School Board and the State School Board as defendants; so now there were new parties-plaintiff and new parties-defendant.

Again a Demurrer, or Motion to Dismiss, for lack of Standing and again the Supreme Court affirmed in an Opinion filed April 2, 1973 (Appendix B47) citing the first case (*White vs Warf*) as precedent and declared White to be "res-judicata" as to all "matters and issues" (Appendix B48) even though no matters and issues had ever been discussed.

Then in 1974 a new group of Taxpayers and Parents from another county (Lincoln) filed suit *Mitchel v. Carmichael (Ingram)* in Davidson Chancery, August 29, 1974 (Appendix B49 Complaint) again to seek valid answers to valid questions which had not yet been considered.

Again a Motion to Dismiss for lack of Standing. However this time the Chancellor sua sponte dismissed the Lincoln defendants for lack of jurisdication under a new ruling (*Adams ex rel State vs. Chattanooga Coke)* by the Tennessee Supreme Court which seemed to require that all governmental bodies must be sued in their own official residences.

A new suit was then filed January 1975 *Mitchel et al vs Crawford* (County Judge of Lincoln County) et al (Appendix B-81 Complaint and Amendment)

The original suit remained in Davidson Chancery with only the Commissioner of Education as defendant.

An Interlocutory appeal as to the Davidson Chancery ruling on jurisdiction was taken to the Supreme Court of Tennessee and an Opinion was rendered on March 31, 1975 (Appendix B-74) granting a Trial on the merits in ~~London~~ Lincoln Chancery on the theory that the State was willing to waive the question of jurisdiction. Counsel objected that under Tennessee law Jurisdiction could not be waived by any defendant and to do so was a denial of due process and invited a void proceeding.

However, upon orders of Supreme Court of Tennessee, under its "new powers", an abbreviated hearing was had in Lincoln County Chancery.

A number of errors involving Federal Constitution rights were committed. ~~They are best summarized in (Appendix) in the "Assignment of Errors filed in the Court of Appeals~~: see also preceding pages 4,5,6,+7

Errors Nos. 1, 2, 3, 5, 6, 8, 9, 10, 12 violate the Constitution of the United States of America Article IV Section 4.

Errors Nos. 4, 6, 11, 14, 12, violate Section 1 of the 14th Amendment (the due process clause)

Error No. 7 violates the First Amendment right to Petition.

Error No. 13 violates the equal protection clause of the Fourteenth Amendment.

The Chancelor of Lincoln dismissed Plaintiffs suit and Plaintiffs perfected an appeal to the Tennessee Court of Appeals. The Court of Appeals affirmed in an Opinion filed 1-30-76 (Appendix B82).

Certiorari and Supersedeas was sought in Supreme Court of Tennessee and denied in an Opinion of April 5, 1976. (Appendix B-97)

On the same day that *Mitchel v. Crawford* was argued, *Mitchel v. Carmichael (Ingram),* before the Court on Writ of Error, was heard and on April 15, 1976, affirmed the Chancellor of Davidson who had dismissed as to all parties in his court.

After the Chancellor of Lincoln had ruled (July 14, 1975) and before the Court of Appeals had ruled on the Appeal from Lincoln Chancery a new group of Taxpayers and Parents from Giles County again employed counsel to file a new suit since no final answer had yet been given to questions raised, and the County Court of that county had not yet built a consolidated school or issued bonds for same.

That suit, *Stewart vs. Wakefield,* (Appendix B99) is not presented here for review. But it is necessary to refer to it briefly because it demonstrates the same determination, the same unyielding resolve of the Commissioner of Education to impose a consolidated centralized school system on an unwilling populace; and it was used as concurrent authority by the Supreme Court of Tennessee to rule in the Lincoln County case and the Davidson County case.

The fact situation in Stewart was different on three major points:

1). The then Commissioner of Education (Warf) who initiated the consolidated school plan was very blunt in his letters; there was no possible room left for the School Board to imagine that it was using its own discretion.

2) The School Board adopted an official resolution in which it said that it was recommending a consolidated school because the Commissioner of Education left them no other choice.

3) The people's petition (containing the signatures of almost half the voters of the County) had been fraudulently re-written by the County Attorney before being presented as

a resolution for the County Court to vote on.

The Chancellor without testimony or hearing, ignored the fact that the people of Lincoln had been accorded a hearing in exact parallel situation, and dismissed the suit and made a *finding of fact* that the sole purpose of the suit was for purposes of delay only, (Appendix B/11) and found further that the original case of *White et al vs. Warf et al* was res judicata to all matters and issues. No matters and issues (other than Standing) have ever been discussed in any case in Giles County.

The Supreme Court on April 15, 1976 not only affirmed but went further and said that no cause of action had been stated and upheld the Chancellor in "all things".

A Petition to re-hear was timely filed. (Appendix B/25)

It was denied May 5, 1976. (Appendix B/34)

Leave to file a second Motion to Re-hear was denied May 27, 1976. (Appendix B/47) Mr. Justice Harbison suggested that counsel address a letter to him outlining questions which the Court had not answered. The letter dated May 17, 1976 appears in the Appendix hereto at page B/37

All three of these cases, by a plan approved by the Court, were argued on the same day (April 1, 1976). Counsel on this occasion filed a written motion asking Justice Henry to re-cuse himself (Appendix B/21) because he had represented Giles County as special advocate on this very question (Young vs. Warf) before he became a member of the Court.

The Motion to re-cuse was denied for mootness: Justice Henry on this occasion was said to have already re-cused himself voluntarily. No statement was made as to why he failed to re-cuse himself at the earlier hearing on the interlocutory appeal (supra) and instead took part in writing an Opinion which counsel verily believes to have been (and is) prejudicial to his clients.

After Justice Henry "voluntarily" recused himself from participation in hearing the final argument on the three cases

(Mitchel vs. Carmichael-Ingram, Mitchel v. Crawford and Stewart vs Wakefield), the Supreme Court failed to follow any procedures to appoint a substitute. The Court was only 4 members. The Constitution requires five. The Court was not properly constituted. This violation of due process was pointed out to the Court in a letter May 17, 1976 which is to be treated as a Motion. (Appendix B/35)

ARGUMENT

The broad position of the people of Lincoln County is that they have under the Tennessee Constitution Article XI Sec. 17 and under the Federal Constitution (Art. IV Section 4) a right to local self government, republican in form;

They have been denied that right.

They have been denied the right of petition. (1st Amendment U. S. Constitution)

They have been denied the right to vote on the question of a bond issue for school houses.

They have been denied their proper day in Court for lack of due process because at the hearing the trial court refused to hear testimony on taxpayer cost; refused to allow testimony by nationally known expert witnesses and the Judge left the courtroom on the single occasion when one local expert did testify; refused to perceive unequal treatment under the law or breech of fiduciary trust when the Commissioner of Education promised $2,000,000.00 of extra funds if the County would adopt his plan for one consolidated school, but promised *no* extra funds if the County persisted in maintaining local community schools. These are only a few of the errors committed by the trial court.

The trial courts and the appellate courts of Tennessee have participated in redefining or ignoring accepted principals of Jurisdiction, Stare Decisis, Standing, Res Judicata, and principles of Declaratory Judgement.

These subjects will be briefly argued:

Jurisdiction

The *local jurisdiction* of the court of chancery is subject to rules set out in T.C.A. *16-617,* Sec. 4, of which provides that:

"Bills against non-residents or persons whose names or residences are unknown may be filed in the county in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which is the subject of the suit or any material part thereof."

And, "person" is defined at T.C.A. *23-1101* to include a *municipal corporation " . . . of any character whatsoever."*

And, counterpart summons may be issued to any other counties of the state for defendants not to be found in the county in which the suit is properly brought. (T.C.A. *16-625, 20-210 & 20-211)*

And, when a declaratory judgment is prayed:

". . . All persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard. "T.C.A. 23-1107

The above language includes county officials: (Shelby County Board of Commissioners v. Shelby Quarterly Court 216 T 470, 392 S W 2d 935 (1965).

And, class actions are not precluded: (Jacks Cookie Corp. v. Giles County 219 T 131, 407 S W 2d 446 (1966).

In the case of *Chamberlin v. State ex rel Scott W. Brown* (Plaintiffs sought a Writ of Mandamus) 387 S W 2d 816, this Honorable Court quoted with approval *Delta Loan Finance Co. v. Long 206 T 709, 336 S* W 2d 5 which through Mr. Justice Felts stated:

". . . The rule is that a commissioner or head of a department of state government may be sued as such *only* in the county of his official residence; . . . . T.C.A. 23-2003 makes a writ of mandamus against a public official returnable in the county where the office is kept. The situs and office of the Department of Insurance and Banking is in Davidson County. This would be true of each division thereof there being no statutes to the contrary."

By authority of all the above, particularly where declaratory relief is sought, it would seem imperative to first *find the real defendant,* the initiator of the wrong, and bring suit against him at his situs and then issue counterpart summons to all necessary parties wherever they may be found.

In the Mitchel vs Carmichael (Ingram) that is precisely what was done. Petitioners filed in good faith against a state official who is a resident of Davidson County; their interest was real and antagonistic in that they asserted that the statute under which the state official functions was unconstitutional, and that the state officials were administrating the statutes in an unconstitutional manner. The actions of the Lincoln County officials were necessarily connected to and dependant upon the action of the state official and they were necessary parties; without them the state official is as Ortega's "Axeman without trees," — a mere abstraction. The Commissioner of Education can not act except by acting upon these local officials. The test of his administration of the law is not possible unless we have as parties those whom he administers.

The learned Chancellor of Davidson, in dismissing the local officials of Lincoln County (Memorandum of Sept. 30, 1974, quoted supra), misinterpreted the Adams case and misapplied it. (Adams vs State ex rel Chatt. Coke 514 SW² 424.)

Adams did not purport to change the rule of the Chamberlain case or Delta Loan Co. case, and nowhere is

this intent stated. If the Court had intended to reverse these cases, it would presumably have so stated.

All that Adams did and all it purports to do is to say that a plaintiff may not forum-shop by naming a State Commissioner as a real defendant, when, in fact he is not, merely for the purpose of issuing counterpart summons to the real defendant who in the Adams case was an arm of the city of Chattanooga.

T.C.A. *53-3422* plainly states that a municipality may set up an Air Pollution Control Board so long as its standards are not "less stringent" than state standards. That is exactly what Chattanooga did. And, Chattanooga Coke and Chemical Co. tried to challenge the rules of the Chattanooga authorities, which had now valid independant powers, by seeking a mandamus against the *State* Board, clearly, then, not the real defendant. The State Board had obviously not exceeded its powers. In the case at bar, Plaintiffs assert that the State Board of Education has unconstitutional power and has acted unconstitutionally in administering its powers. No such assertion was made in Adams. The statutes creating control over air pollution are directed toward encouraging citizen participation. Appeal procedures are set up, T.C.A. 53-3417. Rules and Regulations are the product of public hearings, T.C.A. 53-3415. Actual power resides *in the community*. If the citizen feels abused in a community such as Chattanooga where local authorities exercise control *independant* of the State Board, then the citizen must reasonably complain in the local forum in the manner prescribed.

In the instant case the opposite is true. It is the state power — the State Commissioner of Education who is oppresive; who, with the State Board, promulgates his own rules with no public hearings; it is the State Commissioner of Education who dictates policy to the local Board of Education. The people are not abused by their county board, but by the State Commissioner; there is no provision for a

public hearing; therefore, their only recourse is an action in Chancery at the situs of the state official against whom they complain.

The Delta Loan case plainly states that the situs of (a state commissioner) and official residence is *local like that of a municipal corporation* — and a commissioner or head of a department of state government may be sued as such *only* in the county of his official residence and a number of cases have held that such a suit may *not* be maintained as a transitory action in another county. (Cases cited. Emphasis supplied)

And yet that is exactly what the Tennessee Supreme Court has done under claimed "new powers" (page 2, 1 29, Mitchel v. Carmichael Opinion, March 31, 1975. Appendix _____) in the case at bar. The Tennessee Supreme Court at page 3 of the same Opinion supra speculates that:

> "Where, however, there are bona fide and material local defendants resident in the county of suit, rather than immaterial or token defendants, it may be possible to bring state officials into the county by counterpart service of process. In all events, in the present case, the state officials have willingly submitted to the jurisdiction of the Lincoln County Chancery Courts, and have stated at the bar of this Court that no issue will be raised in those proceedings as to such jurisdiction or as to the validity of any judgment which may be rendered by that Court, insofar as the matters of venue and jurisdiction are concerned."

The Tennessee Supreme Court overlooks rule 12.08 T.R.C.P., (Appendix _____) wherein it is clear that a defendant may not "waive" the question of jurisdiction; that question may be raised at any time sua sponte by any competent court and may not be ignored by the court if brought to the court's attention by any party.

Petitioners herein respectfully suggest that there is present here a new question. Nashville v. Webb and cases following

state that cases against municipalities and counties are local in nature and must be filed in the local forum. On the other hand, Chamberlain & Delta Loan state that state officials sued in their official capacity must be sued at their official residence "like a municipal corporation." What happens when both a municipality or county and a State Department (as here) are defendants in the same suit? Which situs is honored? It can't be both. The Tennessee Supreme Court has refused to answer that question; under T.C.A. 27-120 that court is required to give an opinion in writing — "stating the points of law on which their action is based."

Petitioners respectfully suggest that the perpetrator of the act complained of is the *real* defendant and it is he who must be sued at his official residence. If the wrongful use of power begins in the state official's official residence, which is Davidson County, then that is where the jurisdiction lies and nowhere else. And the Tennessee Supreme Court may not change this fact by asserting "new powers" (Appendix B75#3) it does not have. The powers of this court are limited by the Constitution of Tennessee and may not be enlarged by the Court, the Legislature, or the Governor; only by a Constitutional Amendment, and the Constitution has not been amended. (See T.C.A. 16-330-1-2-3)

It follows that the hearing had in Lincoln Chancery in Mitchel v. Crawford is void and of no effect.

The Right to Referendum

One of the important questions in this cause is: Do citizens have a statutory right to vote on a bond issue for school buildings and must the County Court present such a question to the voters for referendum?

In *State* ex rel *Harbin* v. *Dunn*, 39 Tenn. App. 190, Judge Felts, in an opinion subsequently expressly approved by this Court, wrote at length upon the rule that a prior decision is not authority invalidating other law unnoticed and not expounded upon by the Court in its decision. This is an essential rule, because some cases are briefed and argued

more thoroughly than others, and in some cases a court may overlook a conflicting rule of law not brought to its attention. But for the rule expounded in the *Harbin* decision, there would be no law—there would only be conflicting rules of law demanding opposite decisions under a single set of facts.

Petitioners are aware of the Tennessee Supreme Court decision in *State* ex rel. v. *Safley*, 172 Tenn. 385, holding county courts not obligated to submit the question of bond issuance to the electorate. Petitioners assert that in that decision, the State Court overlooked legal principals, which command a different result. Petitioners assert that they, as litigants who were not parties to the *Safley* case, have a right under the requirements of due process of law, to make these contentions, though they are squarely against the decision in the Safley case, *Blonder-Tongue Labs* v. *University Foundation*, 402 U.S. 313, 329. Clearly, unless such contentions presently made, if they are correct, be permitted to prevail in spite of the conflicting *Safley* decision, the judicial obligation to hear these contentions is but an idle ceremony; and the Due Process and Law of the Land provisions of our Constitutions do not concern themselves with meaningless ceremonies.

Appellants assert that codification in itself is not an original enactment of law. Codification does not, nor is it designed to, change law. It rearranges. It alphabetizes. It assigns new section numbers. But it does not have the purpose of changing the substantive content of law. In Tennessee, if a codification so arranges previous statutes that their meaning is changed, such changed meaning, Petitioners assert, cannot be given effect, or the codifying act will itself be unconstitutional because it will thereby encompass two subjects, the codifying and re-arranging of prior statutory law and changing the meaning of, or amending, part of that prior statutory law. Such would also be beyond the scope of the captions customarily used in codifying legislation, and would violate the very purpose of both these requirements of the Constitution of Tennessee, to

assure that the legislative power would be exercised only by the legislature, and that legislators would be fairly apprised of the content of the measures upon which they were asked to vote. In a codification or re-codification of previous statutes, legislators cannot be expected to compare them with all prior statutes and to ferret out changes in meaning which may be accomplished by printing previous provisions in a single enactment. Petitioners insist that the content of statutory law can be determined only by noting its course of development, rather than concentrating upon the fact that it is re-printed in a single re-enactment; unless this be done, the re-printing changes the content of the statutory provisions, contrary to the provisions of Article II, Section 17, of the Constitution of Tennessee.

The powers of the County Court except for a few powers now relatively insignificant which are vested in it by the Tennessee Constitution, are powers which must find their source in legislative enactments, *Crewse* v. *Beeler,* 186 Tenn. 475.

In 1911, by enactments now codified in T.C.A. 49-701 and 49-702, et seq., the quarterly county courts were authorized by majority vote to issue bonds for purposes which included the erection and repair of school buildings. T.C.A. 49-713. This authorization vested the power solely in the quarterly county courts and required no submission of the issues to the qualified voters of the county.

But in 1923, by enactment now codified as T.C.A. 5-1001, this power of the county court was altered. The Legislature decreed: "Any bonds authorized to be issued by any of the counties, . . . shall *only be upon an election* to be first held by the qualified voters of such county and the assent of a majority of the votes cast in said election; . . ." (Emphasis added). Contrary to the implication in the *Safley* decision, supra, the new 1923 legislation did not involve an *implied* repeal of any of the previous statutory authorizations specially empowering the counties to issue bonds for special

purposes. Instead, it *expressly* altered all these prior grants by expressly requiring that after county court authorization, the issue should be submitted to the electorate before the issuance of bonds. The statute does not appear to authorize the issuance of any bonds, but instead, to change the requisite system for authorizing the issuance of bonds in every case. The statute contained two express exceptions, stating that it should be inapplicable to bond authorizations to replace a destroyed courthouse or to take advantage of enabling acts for state and federal aid for the construction of federal roads. Under the doctrine of *expressio unius,* this implies that there were no other exceptions and indeed, to construe T.C.A. 5-1001 as inapplicable to special statutory authorizations would appear to make it inapplicable to anything, because it sought to modify an existing power rather than to create a new power. Where the county court had had the power to issue bonds solely upon its own authority under statutes, the Legislature now enacted that this power might be utilized only upon "an election . . . and the assent of a majority of the votes cast . . ." This in no way deprived the county court of the authority to resolve that bonds should be issued. It merely changed the legal effect of their authorization by requiring an additional authorization by the voters of the county before the magisterial resolution should empower the county to actually issue the bonds.

But still, under these statutes, and primarily under the original 1911 enactment, the County Court was merely given the power, the discretion to take or withhold action, to fulfill a public need, so that the discretion was for the county court to exercise.

But where the Court earlier had the discretion, in 1925, by an enac ment codified as T.C.A. 49-201, the Legislature imposed certain mandatory duties upon the quarterly county court, including the duty to provide funds to erect a suitable building for one first-class four-year high school, the duty to provide the *minimum of one county high school not being*

qualified by any bonding provision, and such duty being enforceable by mandamus, *State* ex rel. *Harned* v. *Meador,* 154 Tenn. 634. But there were other mandatory duties imposed upon the quarterly county court by this enactment, including the duty "to submit to the voters of the county, . . . the proposition to issue bonds for the purpose of purchasing ground, erecting and furnishing school buildings, . . ." T.C.A. 49-201 (5). By the plain language of this enactment, there was imposed upon the county court the mandatory duty of submitting any bonding proposition for school buildings to the voters of the county; this was not simply a grant of power, because the county courts already had this power, but it was expressly phrased as an imposition of a duty upon the County Court. So that if magistrates should introduce a proposal to authorize a bond issue, the court was required by statute to submit this to the people. But the statute did more than this, and imposed the duty upon the Quarterly County Court "upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith."

So as these statutes gradually evolved, Petitioners insist that they first gave the Quarterly County Court the authority and sole discretion to authorize bonds for the construction of school buildings, they then rendered such magisterial authorization ineffective until it should be approved by the voters, and then added to the discretionary authority the positive duty to submit to the people any proposition for the issuance of school bonds and then to issue those bonds, even contrary to the majority vote of the members of the Quarterly County Court, if the majority of the people should authorize it. Here is a complete statutory scheme, designating and empowering the court to authorize bond issuance, but protecting the people against possible excesses by the court and then protecting the people against possible penuriousness by the court.

Petitioners respectfully submit that this Court's prior

decision in the *Safley* case, supra, is not disposative of these issues, because it *did not note* the mandatory commands of T.C.A. 49-201, nor the fact that T.C.A. 5-1001 was an express change in bond-issuing procedure rather than *possibly* an implied repeal, nor the fact that under the statutory construction canon of *expressio unius,* the statute could not be inapplicable to school bond issues. Petitioners respectfully submit that under the rule that all statutory provisions on the same subject should be construed together, the construction Petitioners suggest is the only one that will give full effect to *all* the enactments which are of equal dignity, and that this construction is in fact not a construction, but only an application of the plain words of each of the statutes in their natural meaning.

Petitioners further assert that the plain meanings of these statutes cannot be changed by the mere act of codification, because the same would constitute a codification with a super-addition of an alteration of the plain meaning of the substantive provision of the statutes. Petitioners further respectfully submit that judicial interpretation of such statutes which is contrary to the plain meaning of the statutes cannot change their meaning, because this would be a judicial amendment of the statute, the Constitution of Tennessee prohibits the courts from exercising the powers of the Legislature, Art. II, 2, and the Supreme Court of Tennessee should seek to stringently avoid even accidentally legislating under the guise of interpretation.

Petitioners therefore respectfully submit that an attempted bond authorization is itself an illegal act, without submission of the issue to the qualified voters of the county, and that such illegal act is injurious to the petitioners as taxpayers and parents, and a violation of their constitutional rights.

Stare Decises

and

An Analysis of State ex rel vs Safley 172T385

In *Harbin* vs. *Dunn* 39 TAP190, Judge Felts at page 212,

paragraph 18, in discussing the principle of *stare decisis* in Tennessee said:

"Of course a decision of our Supreme Court is an imperative precedent for us as an intermediate appellate court; but a decision is a precedent only for the point or points decided."

He went on to quote *State* ex rel vs. *Nashville Baseball Club* 127 T 292, 307, in which the court through Mr. Justice Green said:

"It is a familiar principle that *stare decisis* only applies with reference to decisions *directly upon the point in controversy*. The point in controversy here as to the proper passage of this bill by the Senate was not considered in Hayes v. State.

"Only the points in judgment arising in a particular case before the court are precedents for future decisions. Clark v. Lary, 3 Sneed, 77; Louisville, etc., R. Co. v. (Davidson) County Court, 1 Sneed, (637) 638, 62 Am. Dec. 424.

"The Supreme Court of the United States has said:

" 'Doubtless the doctrine of *stare decisis* is a salutary one and to be adhered to on all proper occasions; but it only arises in respect of decisions directly upon the points in issue.' Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 574, 15 S.Ct. 673, 687, 39 L. Ed. 759."

To the same effect, see: State v. Matthews, 143 Tenn. 463, 475, 226 S.W. 203, 207, 13 A.L.R.314,319; Winters v. American Trust Co., 158 Tenn. 479,493,14 S.W. 2d 740,743; State ex rel. Lea v. Brown, 166 Tenn. 669, 678, 64 S.W.2d 841, 843, 91 A.L.R. 1246.

Judge Felts then went on to say in paragraph 19 that:

"A question which *merely lurks* in the record, neither brought to the attention of the Court nor ruled upon, is not to be considered as having been so decided as to constitute a precedent. KVOS, Inc., v. Associated Press, 299 U.S.

269, 279, 57 S. Ct. 197, 81 L. Ed. 183, 188. Where an applicable *rule (statute* or *common law)* is *overlooked* in the decision of a case, *such decision in not authority* for the proposition that the rule is not to be applied in like cases in the future. Katzenberger v. Weaver, 110 Tenn. 620, 635, 636, 75 S.W. 937, 941; Illinois Cent. R. Co. v. City of Memphis, 21 Tenn. App. 327, 336-346, 110 S.W. 2d 352, 357-363; Burns v. Duncan, 23 Tenn. App. 374, 388, 133 S.W. 2d 1000, 1008. (emphasis added).

"Upon these authorities, we think the McLendon case and like cases above referred to are not precedents for our decision in the case before us. All of them applied the common-law rule that sureties on an officer's bond are liable for an act by virtue of office, but not for an act under color of office. In none of them was this statute, which declares such sureties liable for both classes of acts, considered or mentioned. The only point decided in any of those cases was the issue of common-law liability of the sureties; the point in controversy here as to their liability under this statute was not considered or referred to in any of the cases; and none of them is a precedent or authority for our decision of this question. This being so, it is our duty to follow the rule of the statute rather than the rule of those cases."

As it was the Court's duty, in Harbin vs. Dunn, to follow the statute that applied rather than a line of cases in which the applicable statute was neither "considered or mentioned," so it is the duty of the Trial Court to follow the statute in question (T.C.A. 49-201), rather than the Safley case which does not consider or mention T.C.A. 49-201.

The Tennessee Court of Appeals (opinion, Appendix B 32) clearly erred in citing Safley simply because it covered the "subject matter at hand" in general terms. This is not enough; the "subject matter" must be specifically defined, named, and determined. *T.C.A. 49-201* is not "mentioned or considered" in Safley. It can not be precedent for an interpretation of that statute.

Even the "general subject" of the statute which is discussed and determined (T.C.A. 5-1001, 1923) is different from T.C.A. 49-201. T.C.A. 5-1001 *is* general in application for it refers to all bonds or "any bonds," and requires that they shall be issued "only . . . upon an election to be first held by the qualified voters of such county . . ." and then certain exceptions are made as to renewal or refunding bonds or bonds for the rebuilding of a destroyed courthouse.

In contrast, T.C.A. 49-201 (5) 1925 is specific. It is the *duty* of the Quarterly County Court "to submit to the voters of the county . . . the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings . . ."

This is positive, specific language; not general language as to "any" bonds except certain named exceptions.

Then the statute goes even further and requires the Court to ". . . upon the affirmative vote of the majority cast in said election *to issue* said bonds in accord therewith."

This is new subject matter not present in T.C.A. 5-1001.

Safley justifies its interpretation of T.C.A. 5-1001 on the grounds that it is of a "general" nature, whereas T.C.A. 49-701 specifically relates to education *but so does T.C.A. 49-201*.

Safley notes that ". . . if there be apparent conflict section 13 (now Sec 1-303) of the Code has controlling application reading as follows:

> *Conflicts* - if provisions of different chapters or articles of the code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the *subject matter* of that chapter or article." (Emphasis supplied)

The question immediately occurs, "What if the subject matter of both statutes are the same?" Here the subject matter of both T.C.A. 49-701 and T.C.A. 49-201 is the funding of schoolhouses by bond issue. Mere classification

into chapters by codifiers can not change that. T.C.A. 49-701 is permissive, only, as to authority to be exercised by the County Court and was enacted in 1911. T.C.A. 49-201 is mandatory as to duties of the Court and requires a referendum to the people, and was enacted in 1925. Are we to believe that mere codification made the 1911 statute more specific and changed its force so as to impliedly repeal a law passed fourteen years *later*? If so, the legislation and Safley both were written by the distinguished legal scholar, Mr. Lewis Carroll. "Safley" perceives the small difficulty of in futuro implied repeal and states the ". . . conflicting sections (i.e. 49-701 & 5-1001) under consideration are parts of the code of 1932, and in this sense were enacted contemporaneously." This is legal fiction par excellent. 49-201 is not mentioned at all.

But even as a convenient, if unbelievable, fiction, Section 13 surely is not applicable here. It is not applicable because in 1957 the legislature *reaffirmed* T.C.A. 49-201. It passed a statute codified as T.C.A. 5-1024 which provided that it shall be "necessary" to have a referendum "only" if within 10 days after a bond issue has been authorized by the County Court 10% of the voters of the County petition the Court to hold a referendum. Section 5-1024 is part of a statute enacted as Chapter 224 of the public acts of 1957 and authorizes the issuance of bonds for public works naming but not limiting thereto more than forty purposes for which the bonds may be issued.

In *Wilds* vs. *Coggins* (A taxpayers suit by the way) 496 S W² 496 (1973): "The Chancelor in his opinion took judicial notice that Chapter 224 of the public acts of 1957 as introduced in the general assembly, had included schools as one of the purposes for which the bonds might be issued under its authority, but that during passage the word "schools" had been deleted."

The Chancelor was affirmed.

Thus we see that the only possible reference of the

assembly to a bond issue on schools had to be to 49-201, the only special school bond statute that made a referendum necessary. T.C.A. 5-1024 was originally designed to modify 49-201 by altering the mandatory referendum requirement by compelling a petition by 10% of the voters to be filed with the County Court requesting a referendum. This change was contemplated to apply to a long list of public works. But during debate "schools" was stricken from the list. The only possible purpose was to leave 49-201 undisturbed. And this action confirms that the Legislative was aware of 49-201 and did not wish to disturb it. No other rational conclusion can be reached. Sec. 13 (now TCA 1-303) and its fiction is rejected as to 49-201.

In support of this sleight of brain, (the Sec. 13 fiction) Mr. Chief Justice Neil in Board of Park Commissioners vs. Nashville 134 T 612 at page 629 is quoted as stating:

> "Now while it is true that the language of Sec. 27 is very broad yet in arriving at the intention of the legislature we are not confined to the literal meaning of words in a single section when they are in conflict with words used in a *later* section devoted to a *special subject* standing apart from the general subject to which the former section is devoted." (Emphasis supplied.)

The above quoted section can not be authority for a *reverse* situation, in Safley, where the *earlier* section is *specific* and the *later* section 5-1001 is *general;* it certainly can not apply to the situation in the case at bar where the earlier section is specific (by Chapter heading only) and permissive only and the later section is specific *in the body of the statute* and mandatory.

Safley does discuss a solution to this sort of problem. It quotes Mr. Sedgewick in his "Construction of Statutory and Constitutional Law" at page 98:

> "The reason and philosophy of the rule is that when the mind of the Legislator has been turned to the details of a subject, and he has acted upon it, a *subsequent statute in general terms*, or treating the subject in a general manner, and *not expressly contradicting* the original act shall not be considered as intended to affect the *more particular* or *positive* provisions *unless* it is absolutely necessary to give the latter act such a construction in order that its words shall have *any meaning at all*." (Emphasis supplied.)

Except for the problem that 5-1001 is more positive than 49-701 even if it is at the same time more general, the above authority might apply as the author of Safley wished. But the Sedgewick passage could *not* reasonably apply to a comparison of 49-701 to 49-201 where both are equally specific and 49-201 is later and more positive, and actually more specific if we consider the four corners of the statute and not chapters headings alone.

Finally, Sedgewick (and also Black on Interpretation of Laws) provides a final exception and caveat and states that the more "particular" statute (if indeed it is) shall take precedence over an earlier general act "unless it is absolutely necessary to give the latter act such a construction in order for its words to have *any meaning at all.*"

The decision of the Court of Appeals of Tennessee in Mitchel vs. Crawford (affirmed by the Tennessee Supreme Court) leaves T.C.A. 49-201 without "any meaning at all"; even though 49-201 is not a general statute, and is a later specific statute, the Court of Appeals' decision has interpreted an earlier statute to have the effect of repealing by implication a later statute equally or more specific and more positive.

The Court of Appeals has emasculated 49-201. It has made it disappear. Whereas, in fact, 49-201 is the culmination of an orderly *development* of the law as we have earlier shown in this argument.

From all the above, by all principles of *stare decisis*, Safley can not be used as precedent for wishing away T.C.A. 49-201.

If policy should seem to require that it is not wise to allow parents and other voters (all products of 100 years of public education) to vote on questions of education then this is a matter for the legislature, not the courts.

Local Self Government
and the
Authority of Local School Boards
and the
Commissioner of Education

The statutes of Tennessee give the primary power and authority to run our public schools to local boards of Education. In practice, however, the Commissioner of Education and his agents of the state exercise dictatorial power over the local boards by power of the purse.

T.C.A. 49-102 states that, "any local school system shall be administered by (1) a local board of education and (2) a superintendent or director."

T.C.A. 49-214 states that the duties of the local board shall include the duty "to manage and control all public schools established or that may be established under its jurisdiction."

T.C.A. 49-215 states that the local Board of Education, "shall have the power to make consolidation of two or more schools whenever in *its judgment* the efficiency of said schools would be improved thereby."

T.C.A. 49-224 states that it " . . . shall be the duty of the Board of Education to assign to its superintendant . . ." certain duties including at paragraph seven, " . . . the general supervision of all schools . . . " and at paragraphs 17, 18, 19, and 20, to make certain reports to *local* authorities.

T.C.A. 49-1105 provides that each county in the state shall have at least one senior high school which shall offer a "full course of study" approved by the State Board of Education and that ordinarily there shall be at least 300 students in said

school, but there may be less and power of consolidation enjoyed by the local school board is specifically preserved. There are other provisions not relevant here.

From all of the above, it would seem clear that public schools by law are operated and run by local school boards.

> "The County Board of Education has exclusive management and control of the county schools . . . " Benson v. Hardin County (1938) 173 T 246, 116 SW 2d 1025.

So much for the law. Actually, the local boards operate subject to the approval of the Commissioner of Education and the State Board of Education. No major decision is made without state approval and direction.

What are the statutory powers of the Commissioner of Education and the State Board of Education?

T.C.A. 49-105 sets out the powers and duties of the Commissioner. He is Chairman and voting member of the State Board of Education. He has wide appointive power subject to approval by the Governor. He himself is appointed by the Governor.

The Commissioner of Education is given power "in his discretion" to "enforce" the Rules and Regulations which he and his board have created (under authority of T.C.A. 49-108).

T.C.A. 49-604 (B) 1, 2, and 3 provide:

> **49-604.** ANNUAL DISTRIBUTION OF MINIMUM FOUNDATION SCHOOL PROGRAM FUNDS — TIME — REQUIREMENTS.
>
> B. In order for any public school system to receive the state funds appropriated for the minimum foundation school program as determined in 49-603, such system shall meet the following conditions and requirements. In order to enforce the same, the state commissioner of education may, in his discretion, withhold a portion or

all of the state school funds which the system is otherwise eligible to receive.

1. Every school system shall meet the requirements of state law as to the operation of such system.

2. Every school system shall meet the rules, regulations, and minimum standards established by the state board of education for the location, construction and operation of schools.

3. Every school in every school system shall meet the requirements of the state board of education for an approved school. (Acts. 1925, ch. 115, 17; Shan. Supp., 1487a124; Code 1932, 2416; Acts 1972 (Adj. S.), Ch. 693, 6.)

T.C.A. 49-602 E provides:

E. *Capital Outlay*

There shall be included in the minimum foundation school program an amount to be used exclusively for the purpose of capital outlay, including the *purchase* and *improvement* of *sites,* the construction of *buildings,* the remodeling or renovation of buildings, the purchase of equipment for schools and school buildings, and the purchase of pupil *transportation* equipment; for the public schools of this state, which sum shall be distributed by the state commissioner of education as provided in this chapter among the public school systems of the state upon the conditions hereinafter prescribed in this subsection. The amounts of funds so distributed to each school system under the provisions of this subsection may be used in the discretion of the local board of education for the payment or other forms of legal indebtedness of original issue, issued by the system for school capital outlay purposes since July 1, 1947, including school bonds refunding school capital outlay bonds of original issue since July 1, 1947.

AND **E 9** and **10** provide:

9. The state funds for the public schools for capital outlay purposes distributed under the provisions of this Chapter shall be obligated and expended only according to a plan (A) *recommended by the local superintendent of schools and approved by the local board of education,* (b) filed with the state commissioner of education on or before August 1 of the current school year, on forms prescribed by him, and (c) *approved by the state commissioner of education.* However, such plan may be amended during the school year to meet changing conditions or emergencies, but such amendment shall be filed with, and approved by, the state commissioner of education before any funds referred to hereinabove in this paragraph shall be obligated or expended for the purpose of the amendment.

10. The state board of education shall establish *minimum standards* for school *sites,* including locations, schools attendance centers, the construction of *buildings* for school purposes, the *remodeling* or renovation of buildings for school purposes of a capital outlay nature, and for *equipment* for buildings for school purposes. No local board of education shall obligate or expend any state or local school funds for any project of a capital outlay nature which does not conform to the standards adopted by the State board of education as authorized in this paragraph. (Emphasis supplied.)

In a word, the statutes giving power to the local Board of Education and the statutes delegating power to the Commissioner and his board are contradictory.

What is given to the local authorities in principle is taken away in practice, because the one power that counts is given to the Commissioner, and that is the power of the purse. The local board may choose any plan and propose at will, but unless it chooses as the Commissioner and his board wishes it to choose, the state funds are cut off.

The power of the Commissioner is flexible. He may waive

certain requirements or he may not, according to his discretion.

The Commissioner and his board write the Rules and Regulations which have the force of law; the Commissioner may enforce them or waive them for limited times; he appoints advisors, regulators, supervisors, who descend upon the local authorities and tell them what they must do to bring their school system up to minimum standards; the schools are inspected by those who *write* and *interpret* the "standards." If, having promulgated the standards, interpreted them, and judged the schools, the regulators find a matter that displeases them, the Commissioner may then punish by withholding funds. The Commissioner is at once legislature, judge, and administrator.

This is too much power concentrated in one place. It violates Art. II, Sec. I, of the Constitution of Tennessee which provides for the separation of powers, and it violates Art. XI, Sec. 17, of the Constitution of Tennessee which provides that:

> "No county office created by the Legislature shall be filled otherwise than by the people or the county court." (The time at which this section appeared in the Constitution is significant—1870. The state had just endured a long period of centralized "reconstruction" government under which "an orgie of commissioners appointed from Nashville, many of them hostile in sentiment and conduct to the people over whom they were set . . . " Prescott v. Duncan 1912, 126 T 106, and Tennessee wanted no more of that.
>
> And it violates Article IV Sec 4 of the Const. of the U.S., and amendment 14 U.S. Const.

The rule making power used and possessed by the Commissioner is exactly parallel to the situation found in *Schecter Poultry* v. *United States* 295 U.S. 495, 44 S. Ct. 837, 79 L. Ed. 1570 (1935), which states:

> "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation . . . of industry."
>
> "It supplies (Section 3 of the Recovery Act) no standards . . . Instead it authorizes the making of codes to prescribe theirs. The code-making authority thus sought to be conferred is an unconstitutional delegation of legislative power."

And, our own Tennessee case of *Malone* v. *Williams* 118 T. 390 holds that where an official had power to decide, whether or not " . . . in his opinion a nuisance exists on public or private property" and then may proceed to "remove such nuisance" that this was "arbitrary power" and that:

> "No man is wise enough or good enough to be vested with arbitrary power over the property of his fellow citizens . . . provisions which give rise to these powers are in violation of Section 8, Article I of our State Constitution, which provides "that no man shall be taken or imprisioned, or disseized of his free hold liberties or privileges outlawed or exiled in any manner destroyed or deprived of his life, liberty, or property but by the judgement of his peers or the law of the land.' They (the provisions) are, therefore, void." (pp. 417-18)

The power statutes of the Commissioner of Education are on their face too broad and invite abuse of power by the Commissioner.

There is, for instance, no method for review; no hearing authority for citizen complaint. A taxpayer or parent may not at present according to the Supreme Court of Tennessee have his day in court or sue the Commissioner of Education.

That the power is abused is typified by letters from the Commissioner to various school boards across the state. They are letters of command; or they are theatening letters; for example, the letter from the Commissioner of Education

to the School Board of Giles County which states plainly that he, the Commissioner, would not rebuild a burned and destroyed school until "all" schools in the county were brought up to his standards. *Stewart* v. *Wakefield*, Appendix B-99). And this in spite of the plain provisions of T.C.A. 49-1105, which requires of a county only one high school that comes up to the Commissioner's standards. And there, in this same letter, he offers an alternative, ". . . the solution to your problem is one consolidated school . . ." and goes on to tell the School Board if it does not comply that he, the Commissioner, will be forced to cut off funds.

It is the same in Mitchel v Crawford, only the letters are from another Commissioner. They are more adroit, more subtle. But the message is the same. See, for instance, the uncontradicted testimony of school board member Pendergrass at Tr. P. 70, "we had no choice." Or of Squire Walker at Tr. P. 115, ". . . it was like Hitler." Or of Deputy Commissioner Hunter at Tr. P. 149, ". . . we never consult parents." That was in Lincoln County. In Giles County, the school Board officially went on record saying in its minutes that it was submitting a consolidated school plan to the County Court only because of the demands of the Commissioner of Education. Appendix B 33 #4)

Consider particularly here Section 15 of T.C.A. 49-105 which sets the *fiduciary* responsibilities of the Commissioner of Education.

> Whenever it shall appear to the commissioner of education from the report of any school official or from *any other reliable* source that any portion of the *school fund* has been lost, *misappropriated*, or in any way *illegally disposed* of, or not collected, *or is in danger of loss, misappropriation, illegal disposition* or failure of collection, the commissioner may call upon the district attorney or county judge or chairman of the county court, or the county attorney, to protect, recover, or force

> collection of such funds, provided the governor shall first give his approval to such action. This provision, however, shall not prohibit suits by one political subdivision against another political subdivision in the same county, or *against the county*, when the consent of the state commissioner of education, with the consent of the governor and with the approval of the attorney-general, is hereby authorized to employ private legal counsel in order *to protect*, recover, or force collection of any school funds.
>
> The *commissioner* shall have *authority* to send a supervisor or supervisors as herein provided for, to any local school system to *make investigation* of public school accounts, records, and files of any official handling the school funds or administering the public school system, and to enforce all school laws and regulations of the commissioner of education *provided* that this duty of the commissioner shall not be exercised until the *local board of education shall have requested such investigation.* (Emphasis supplied.)

And, *Garner* v. *Scales* (1946), 183 T 577, 194 SW 2d 452 says:

> "The plain purpose of subdivision 15 was to confer upon the *state commissioner of education* the authority to determine when any part of the school fund was in jeopardy *or being wasted* and it was left to him to decide with the consent of the governor when to institute legal proceedings for the protection of school funds, and the legislative intent was to *prevent the squandering of school funds* . . ." (Emphasis supplied.)

And yet with all these clear fiduciary duties neither the Commissioner of Education nor his deputies advised the Board of Education of Lincoln County that cost studies should be made and *alternate* plans should be considered. Never was any cost analysis made of consolidated versus community schools made. Only *one* architect's *estimate*.

This is fiscally irresponsible and capricious and may be corrected by the Court.

"Where it is shown that there is an arbitrary or capricious use of power being excercised by those in authority the Courts will not tolerate the use of such power."

State v. *Yoakum* 297 SW 2nd 635

And in *Cheatham* v. *Baker* 161 T 222 we have:

". . . The county is entitled to have the Commissioner in the exercise of . . . discretion consider and weigh fairly *all* the available information and data as to the feasibility route, cost and availibility of funds, etc. If by a gross or palpable abuse of discretion or a failure to exercise it the county (or its citizens) is deprived of this right it may rightfully resort to the courts for redress."

In *Citizens to Preserve Overton Park* vs. *Volpe* 357 F. Supp. 846 (1973), it was held that an appointed commissioner had a duty to explore and consider alternatives himself:

"In considering whether to route federal hi-way through city park, the Secretary of Transportation was obligated not only to find that there is a feasible and prudent alternative, but also to at least designate such alternative . . ."

Our Commissioner of Education does not feel compelled to perform such duties. If he is not required to do so, he has unconstitutional power; if he is required to do so under his fiduciary duties, it is clear he has failed to perform his duty.

When the law vests discretion in an official, it is the obligation of the official to himself exercise that discretion; an example is seen in the inability of a circuit judge to simply overrule a motion in order that an appeal may be perfected without himself exercising the discretion and judgment as to whether a new trial is required by his personal assessment of the evidence, *Railroad* v. *Lee*, 95 Tenn. 388. It seems clear that if someone should use a gun to compel the Governor to approve a legislative enactment, this would not be a valid

official act, because the Governors personal discretion would not have been exercised.

Citizens, entitled to be governed in accordance with the law of the land when the government seeks to take their property by taxation or to control the education of their children by regulation, *are entitled to have discretionary judgment exercised by the officials in whom the law vests the discretion*. This the Chancellor below never grasped. See his Opinion as quoted at page 6 of the Court of Appeals Opinion, (Appendix B-84 where in the middle of the second paragraph the Chancellor says:

"The real issue in this cause is whether or not Lincoln County schools are meeting a minimum standard for school plants as laid down by the State Board of Education and whether or not there were any deficiencies existing in the local school system prior to the opening of school in September of 1973."

This is not the "real issue." The real issue, or one of them, as stated by Plaintiffs in their Complaint, is: Did the taxpayers and parents of Lincoln County receive the benefit, as was their due, of the free and independant discretion of their School Board and of their County Court?

While the vital question, the existence of viable alternatives, was being testified to by Plaintiffs' expert witness, the Chancellor "went out for a drink" (Tr. P227 17-19), and then on returning gave his opinion from the bench without benefit of record, or transcript, or testimony.

Petitioners contend that they have received no answer to this vital question.

For this reason, Petitioners submit that even if the quarterly county court has authority to authorize the issuance of bonds for school construction without submitting the issue to the people, aside from the mandatory duty to provide the minimum of one high school, Petitioners have a right not to have this new regimentation imposed upon their children until free and independant discretion has been

exercised by those officials in whom the discretion is by law vested, the County School Board and County Court.

Petitioners recognize that when the Legislature by statute imposes a mandatory duty upon the quarterly county court, they are necessarily helpless, even if this is contrary to their wishes, because they must yield to lawful government. But Petitioners insist that when such coercion is inflicted — not by the lawful legislative power of the state, but by one who lacks the authority he claims, that if the County Court or the Board of Education then yield to such coercion without exercising their own judgment and discretion, Petitioners have the right not to have their rights diminished until the local authorities have been freed from such unlawful coercion by declaratory judgment or by injunction, and have exercised their own untrammeled discretion. Such was the insistance in the complaint in these cases.

Unequal Protection of the Law
and the
$2,000,000.00 Question

Perhaps the most obvious and dramatic example of improper influence worked upon the Lincoln Board of Education and the County Court by the Commissioner of Education was the manner in which $2,000,000.00 worth of vocational education money was offered to the county authorities as an inducement to fund the big new consolidated school desired by the Commissioner of Education. This fund of $2,000,000.00 of course, was not his to offer. If Lincoln County had a right to this fund, and it did, it had a right to it in connection with the community school plan as well as with the consolidated school plan. But it was never offered in connection with the community school plan.

The Lincoln County Court Minutes of August 13, 1973, reveal that the meeting of that date was called among other things:

> "To hear, consider, discuss, and act upon a request of the Lincoln County School Board that the Quarterly Court of Lincoln County, Tennessee, authorize a plan of appropriating $2,000,000.00 to construct one comprehensive high school, subject to state approval of a similar amount for vocational instruction."

These same Minutes reproduce a letter from the Commissioner of Education to the Superintendent of Schools of Lincoln County, in which he approves the single comprehensive plan (par. 3 of his letter), and observes that the community high schools plan would cost "at least twice as much ($8,000,000.00) . . . " as the consolidated Plan.

He was thus figuring the outlay to the county for the single comprehensive school plan to be only $4,000,000.00. The county would then receive another $2,000,000.00 for vocational education. No mention is made of the $2,000,000.00 vocational education fund as part of or in connection with the estimated $8,000,000.00 cost of community high schools.

Dr. Wayne Myers clarified the state's position on the $2,000,000.00 question at this same meeting and the Minutes reveal that Squire J. F. Walker moved that the Court appropriate $2,000,000.00 for the "repair and remodeling" of Lincoln County Schools. A discussion followed in which Dr. Myers is quoted thusly:

> "Dr. Myers . . . stated that the state would consider the $2,000,000.00 amount (for remodeling and repair) sufficient *only in connection with a plan for a comprehensive high school.*" (Emphasis supplied.)

No offer of vocational education money was ever made in connection with the community high schools plan.

On August 30, Minutes of the County Court reveal that after much maneuvering and discussing, Squire William R. Carter moved the County Court approve the single comprehensive school plan,

". . . provided and after, and *with the full understanding* that the State of Tennessee make available approximately $2,000,000.00 to totally fund the vocational education of the new senior high school *in accord with the letter* to the Lincoln County School Superintendent *from the Commissioner of Education* dated August 10, 1973 . . ." (Emphasis supplied.)

Before this was voted on, Squire Bullington moved that the,

" . . . Lincoln County Court not appropriate one red cent of this $2,000,000.00 for the Senior High School (the new single comprehensive school) until the state of Tennessee matches it with a firm committment 'tit for tat'; and if and when the state makes a firm committment of an equal amount, we will then appropriate our part, but not until then; let them put their money where their mouths are."

This is a deal. It is an illegal deal. The Commissioner used money to which the county had a right to use as it wished, the Commissioner used it as bait to accomplish what *he* wished.

The Tennessee Court of Appeals overlooked all this and the Tennessee Supreme Court has agreed with the court of appeals. It was brought to the Chancellor's attention and cited as error.

On page 132, of the Tr., the County Attorney at line 11, sets out and admits the deal in his cross examination of Squire Walker.

On page 136, of the Tr., Squire Walker said he did not think the State would contribute $2,000,000.00 vocational education money to the community school plan—the "$8,000,000.00 plan."

The Chancellor expressed concern and on page 138, said: "*I thought it was $2,000,000.00* (contribution) *either way,* (i.e. to either plan) *but that was wrong.*" (Emphasis supplied.)

On page 208, of the Tr., The Superintendent of Schools at line 12, testified that none of the $2,000,000.00 vocational education fund was offered by the state in connection with the community school plan.

On page 216, of the Tr., Assistant Attorney General Lodge advised the Court that the only offer made by the state was $2,000,000.00 in support of the single comprehensive school plan.

The Court of Appeals accepted without question all the Chancellor's interesting conclusions on the above subject. The Chancellor concluded that since by *law* the county was due the $2,000,000.00 vocational education fund in any connection it chose and " . . . the county court certainly had plenty of time between the events of the summer of '73 and the issuance of the bonds in 1974, to find out all the facts, to find out whether or not the county would be deprived of $2,000,000.00 vocational education money if it did not build a comprehensive school." The Chancellor has a wry humor. The Quarterly Court did have the time, but Quarterly Court did not have the source. Its source was the Commissioner of Education to rely on; and his sense of fiduciary duty was overshadowed by his sense of educational desire, not to say passion, and during all this time of pleasant leisure, within which the County Court had to research its rights, the Commissioner of Education was busy with promises which were calculated not to enlighten, but to tempt. He was successful.

The Chancellor and the Tennessee Court of Appeals and the Tennessee Supreme Court are too easily satisfied. The fact that the vocational education money was not available when the community school plan was first offered surely could not mean that it was not available for both plans or either plan when the money did become available. But neither the County Court nor the School Board ever got to exercise their discretion on this point even though the vocational education law (Appendix) specifically

provides for a vocational school *separate* from a "comprehensive" school.

The Right of Petition

The Tennessee Court of Appeals erred in overlooking the fact that the Chancellor (Tr. page 23, 1.10) improperly ruled that 4500 voters of Lincoln County did not have a Right of Petition under Art. I, Sec. 1, of the Constitution of Tennessee and prevented the introduction of their Petitions in testimony.

Standing

For many years the right of taxpayers to sue has been well established in Tennessee.

But the Opinion filed April 15, 1976 in Mitchel vs. Carmichael (Ingram) (Appendix B49) by the Supreme Court of Tennessee has apparently changed all that with no explanation and no rationale. Mitchel vs. Carmichael (Ingram) is, of course, sought to be reviewed here.

The first paragraph of the second page of the two (2) page Opinion contains the entire reasoning of the Court on this point:

"We consider the contentions of the appellant to be without merit. Insofar as their complaint against State officials is concerned, we consider the action to be controlled by the decision of this Court in the case of *Sanders v. Carmichael, 527 SW²92 (Tenn. 1975)*. Further, plaintiffs have had a trial on the merits of the suit which they may not now attempt to relitigate those same issues in this action." Sanders has no relevance to this case.

Sanders is simply a contracts case where a school teacher under the Tennessee Tenure Act sought to preserve her contract of employment rights against the School Board. In the course of the proceedings she sought to name the Commissioner of Education as party defendant because he withheld salary funds from the school system where she worked. Whether this was the result of some personal

vendatta between the Teacher and the Commissioner of Education is unknown to counsel but the Courts of Tennessee found it to be a case based on contracts and nothing more, so she could sue only the party with whom she had a contract which was the local School Board, and not the Commissioner of Education.

Petitioners herein claim no contract rights and have brought a class action under the Declaratory Judgement Act to have the constitutionality of certain statutes (and their administration) construed. A suit based on contracts could not possibly have any relevant precedence in this situation.

The right of taxpayers to bring suit against governmental units in Tennessee and the conditions prescribed for so doing is clearly set out in the Law of Tennessee from as early as 1876. In *Colburn* v. *Chatt,* 2 Shanon 22, Justice Lea held for the court that:

> Any taxpayer may bring his bill in equity to prevent the corporate authorities of a city from acting ultra vires, where the effect will be to impose on him an unlawful tax or to increase his burden of taxation. It is not required that the attorney general file such a bill.

The Court quoted a "distinguished author" to the effect that: "It is the part of true wisdom to keep the corporate (or governmental) wings clipped down to lawful standard."

This case has been followed by a long line of cases and the principle of law is most succinctly stated in *Reams* v. *Board of Mayor & Alderman of McMinnville,* 155 T 222:

> The right of taxpayers to resort to a court of equity to enjoin county and municipal authorities from transcending their lawful powers or violating their legal obligations is well established if such conduct would impose a burden of taxation, for the imposition of such burden is not common to citizens who pay no taxes (citing cases).
>
> The taxpayer may maintain the suit to restrain action of the municipal authorities only when they are acting

illegally and when the effect of their illegal action will impose an additional burden of taxation.

The Plaintiffs in the case at bar fit all the requirements above; they are landowners subject to taxes not suffered by non-landowners; their taxes will be increased by the debt incurred by the proposed county bond issue; the assert that bond issue is the direct result of illegal acts of the Commissioner of Education and the unconstitionality of the Education Act of Tennessee. As a result the School Board of Lincoln County and the County Court have been deprived of the right and duty to exercise independant discretion for the good of the schools and the financial stability of the county.

The Plaintiffs herein are not only taxpayers, they are parents and grandparents of children in the Lincoln County School system who will be seriously affected by the proposed consolidated school. There is no human motivation more powerful than the ties of family love, and every parent has a vital interest in the welfare of his child, which gives him a very personal and special interest in decisions made — legally or illegally — which may affect his child's education. It may warm the cockles of a school administrator's heart to visualize a giant consolidated school, but parents also have a right to their judgement as to what is best for their children, they may have entirely valid reasons for preferring that their children be educated near home in a small school where personal attention is more apt to be received, and this is an interest not shared either by citizens generally or by taxpayers.

If a school board illegally arrives at a decision to abandon existing schools and to subject all high school children to a consolidated-school environment, parents clearly have a right to contest the legality of such decision.

They have properly charged unconstitutional and illegal acts which threaten to inflict injury on the plaintiffs' interest as parents and these charges must be considered before any other matters are weighed.

In the case at bar in addition to taxpayers and parents, the children themselves are petitioning this honorable court and Chancery has a special regard for the rights and welfare of children: ". . . the court at all times having in view the best interest of the parties, and acting as would a prudent and considerate parent."* Too often, in these days, well meaning but misguided officials have lost sight of the welfare of the children in subjecting them to unnecessarily long and hazardous bus rides to distant destinations of doubtful educational or social value. They have forgotten the wise admonitions of *Pierce vs. Society of Sisters* wherein the U. S. Supreme Court said:

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

And, *Barnette vs. West Virginia* which stated:

> "As Governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing . . . If there is any fixed star in our constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The Declaratory Judgement Act

This is a Petition for a Declaratory Judgement and the question of "standing" must be viewed in the light of that fact.

The questions to be considered hereunder must be "real

*Gibsons Suits in Chancery, Second Edition, Paragraph 35

and not theoretical" and certainly we have in the instant case a real and present question. A comparable case is *Buntin v. Crowder*, 273 T 398, 118 S W² 221, where it was held:

> Where complainant is interested in having an act declared unconstitutional and the defendants are interested in having the act upheld, the parties are entitled to a ruling under this section. (The Declaratory Judgement Act)
>
> And liberal construction is required under the act:
> This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. (T.C.A. 23-1113)

Plaintiffs herein fit perfectly, all requirements as set out by our Tenn Supreme Court in a 1965 case:

> The only requirement for a controversy such as will invoke the action of the Court and have it declare rights under this chapter are that the question must be real and not theoretical, the person raising it must have a real interest, and there must be someone having a real interest in the question who may oppose the declaration sought. It is not necessary that any breech be first committed, any right invaded or any wrong done. *Williams* v. *American Plan Corp.* (1965) 216 T 435, 392 S W² 920.

The principles envolved in the creation of the uniform Declaratory Judgement Act has been broadened even further in practice in modern times.

In the Vanderbilt Law Review, Vol. 24 at page 280, we find:

> As governmental power has grown, the court (U.S. Supreme Court) has simultaneously become more alert to the need for protection of the individual, and the concept of a citizens champion has moved increasingly to the fore.
>
> Parent's suits, *(Engle v. Vitale,* 370 US 421, (1962) Taxpayer's suits *(Flast v. Cohen,* 392 US 83, 1968) Busrider's suits *(Evers v. Dwyer* 358 US 202, 1958) and in Tennessee, a voter's suit *(Baker v. Carr)* have all been heard and the Plaintiffs granted standing. (The newly developed "nexus" requirement would be well met here by Parents and children).

The author of the Law Review article went on to say that "in light of these cases (and others), there is every indication that the courts will continue to encourage public interest litigation by private citizens."

But not in Tennessee because the Supreme Court of this State is apparently determined to apply Sanders vs. Carmichael to prevent Taxpayers or Parents from obtaining any relief in our Courts against state officials. On April 15, 1976 the Court in Stewart vs. Wakefield again cited Sanders as full and complete authority to deny to classes of Taxpayers and Parents any standing to sue "State officials."

The Court also held that the right to sue "local officials had been decided in "two previous Opinions" in the County (Giles). This in an apparent reference to White et al vs Warf et al. and Young et al vs Warf et al wherein the Court made the remarkable discovery that a case where taxpayers were found (erroneously) not to have standing then that case was res judicata to "all matters and issues."

The Supreme Court of Tennessee apparently realizing that a case dismissed for lack of standing does not dismiss it for matters and issues went further in its Stewart vs Wakefield opinion and said that not only should the case be dismissed for lack of standing "— but upon failure of the Complaint to state a claim for which relief could be granted particularly insofar as the referendum issue is concerned that issue having been so thoroughly disposed of on repeated occasions by this Court."

What about "particularly insofar" as other issues are concerned? Does that Court have some small doubt that there may be merit in some of the Complaint? — but not (certainly) on the referendum issue?

The Complaint did not ask for a construction of the

"referendum issue", but of a specific statute 49-201 (5) in its entirety. This the Court has *never* done.

This Tennessee Statute 49-201 (5) simply states:

> The duties of the Quarterly County Court shall be: (and 9 duties are listed, the 5th alone is here quoted)
>
> 5. To submit to the voters of the County at any regular session or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.

The County Courts have ignored this provision and the Supreme Court has never construed this section in its entirety and has not done so here.

This is the same statute that is crucial to the Mitchel et al vs Carmichael (Ingram) and Mitchel et al vs Crawford et al.

The Tennessee Supreme Court in its Opinion cited a number of cases in support of its delusion that it has "repeatedly" considered the question of referendum and so also 49-201 (5) presented herein by Petitioners:

Wilds v. Coggins, 496 S. W. 2d 460 (Tenn. 1973)
State v. Safley, 192 Tenn. 385, 112 S. W. 2d 831 (1938)
Crewse v. Beeler, 186 Tenn. 475, 212 S. W. 2d 39 (1948)
Southern v. Beeler, 183 Tenn. 272, 283, 195 S. W. 2d 857 (1946)

But none of these authorities, cited by the Court, are recognized by Shephards Citations as dealing with the meaning of the statute in question, T.C.A. 49-201.

Appellants ask for an interpretation of T.C.A. 49-201; not T.C.A. 5-1001.

The cases cited by this learned Court (supra) *do not mention or discuss T.C.A. 49-201;* they do discuss T.C.A. 5-1001.

Appellants would most respectfully point out that T.C.A. 5-1001 is not T.C.A. 49-201. The language, intent, and powers granted, and the specific subject matter, are *different.*

Shephards Citations *does* list a number of cases wherein T.C.A. 49-201 *has* been interpreted. The statute has nine subsections. Some of the cases, cited by Shephards, consider subsections which are not in controversy here. But *Lamb vs. State* 338 SW2 584, 207 T 162, does deal with the second clause of the subsection in question here (5), and states that: "The statute provides that the duties of the Quarterly Court *shall be:*

> (5) To submit to the voters of the county, at any regular sessions, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, *upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.*" (Emphasis supplied by Court.)

The second clause was underlined by the Court because the issue in that case was whether or not the County Court should be compelled by mandamus to issue bonds after an affirmative vote on the question by the voters.

This Court's description of T.C.A. 49-201 is interesting:

> "In the instant case we can not escape the fact that the statute hereinabove quoted (49-201) *plainly prescribes* a *specific* duty or act on the part of the County Court to be performed in that it is said *(there is no ambiguity in the statute at all)* that when a referendum has been had and the vote is in the affirmative then it becomes the duty, and is the duty of the County Court to issue said bonds in accord therewith." (Emphasis supplied.)

The Court then finally concluded that "*shall*" is mandatory language and affirmed the issuance of a mandamus.

None of the cases cited as authority by the Tennessee Supreme Court in its Opinion of April 15, 1976, is recognized by the Shephard Citators as having anything to do with the statute which petitioners have sought to have construed, and which this Court says it has construed in these cases.

Counsel has also read these cases and has been unable to find references to the statute on which the Petitioner's rely.

Counsel humbly recognizes that he is a mere advocate before the Court and does not enjoy the position of impartiality which the Court of course has, but Counsel believes, that a reasonable discussion of this Statute in language that would be understandable to citizens and lawyers and recorders of precedent such as the Shephard Citators would be useful. In *Joint Anti-Facist Refugee Committee vs. McGrath* 341 US 123, the United States Supreme Court said:

> "An appropriate governmental 'determination' must be the result of the process of reasoning. It can not be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination'. It is implicit in a government of laws and not of men (341 US at 136)."

On the same subject, Justice Marshall said in relation to the proper performance of the judicial function in *Osborn v. Bank of the United States,* 9 Wheat. 738:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can do nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of law." (9 Wheat . . ., at 866).

In the instant case, the Supreme Court of Tennessee and the Chancellor have used the "Judicial Power" condemned in *Osborn, supra,* i.e. we have opinion without rationale. (See T.C.A. 27-120)

THE CONSTITUTION OF THE COURT

In the hearing conducted by the Supreme Court on Mitchel et al v. Carmichael-(Ingram) et al and Mitchel et al Crawford et al (as well as Stewart et al vs Wakefield et al) Judge Henry recused himself because in former days he had represented Giles County in Young et al vs. Warf et al.

The remaining members failed to replace him as required by law thereby depriving litigants of a duly constituted Court and therefore due process.

In such case the Constitution and statutes provide only one means for replacing such incompetent judges: certification of the fact to the Governor who "shall forthwith specially commission the requisite number of men, of law knowledge, for trial and determination thereof". Article VI Section 11 Constitution of Tennessee. See also T.C.A. Sections 17-202, 17-203.

The four Judges were not sitting as a properly constituted Court.

> "The words 'due process of law,' when applied to judicial proceedings, . . . 'means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is by the law of its creation — to pass upon the subject-matter of the suit . . . .' "
>
> —*Scott v. McNeal,*
> 154 U.S. 34, 46 (1894)

And in the same case, this Court held that on review of the judgment of the highest court of the state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is not bound by the State court's construction of a statute of the territory, or of the State. 154 U.S. at 45.

More recently, this Court has said:

" 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice.' *Offcutt v. United States,* 348 U. S. 11, 14.' " [Emphasis by the Court.]

—*Estes v. Texas*
381 U.S. 532, 543 (1965)
quoting *In re Murchison,* 349 U.S.
133, 136 (1955)

And it is now well established in the opinions of this Court that "once established . . . avenues of [appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts," and that the appellate process of the states must meet the standards of both the equal protection and due process clauses of the Fourteenth Amendment. *Mayer v. Chicago,* 404 U.S. 189, 193 (1971), and cases there cited.

See also *Gibson v. Berryhill, . . . U.S. . . ., 36 L. Ed. 2d 488 (1973).*

CONCLUSION

Certiorari should be granted in this case on each of the questions to determine whether the procedure, results, and the constitution of the Tribunals below comport with the applicable requirements of the Constitution of the United States.

Respectfully submitted:

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution

Article 4, Sec 4 Guaranty of republican form of government and against invasion.—The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convenced) against domestic violence.

AMENDMENT 14

§ 1. **Citizenship—Due process of law—Equal protection.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tenn Constitution
Article I

Section 1. All power inherent in the people—Government under their control.—That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of those ends they have at all times, *an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.*

Sec. 2. Doctrine of nonresistance condemned.—That governemnt being instituted for the common benefit, *the doctrine of non-resistance against arbitrary power and*

oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Sec. 5. Elections to be free and equal—Right of suffrage.—The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Sec. 8. No man to be disturbed but by law.—That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Sec. 21. No man's services or property taken without consent or compensation.—That no man's particular services shall be demanded, or property taken, or *applied to public use,* without the consent of his representatives, or without just compensation being made therefor.

Article II, Sec. 1. "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial."

Article II, §2, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

Article VI, §2, "The Supreme Court shall consist of five judges . . . The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law . . . "

Article VI, Sec. 11. Incompetency of judges—Special judges.—No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity of consanguinity, within such degrees as may be prescribed by law, *or in which he may have been of counsel,* or in which he may have presided in any inferior Court, except by consent of all the parties. In case all or any of the Judges of the Supreme Court shall thus be disqualified from presiding on the trial of any cause or causes, the Court, or the Judges thereof, shall certify the same to the Governor of the State, and he shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination therof. The Legislature may by general laws make provision that special Judges may be appointed, to hold any Courts the Judge of which shall be unable or fail to attend or sit; or to hear any cause in which the Judge may be incompetent. (Emphasis supplied)

Tennessee Code Annotated

16-330 Inferior courts—Supervisory control.—In order to insure the harmonious, efficient and uniform operation of the judicial system of the state, the Supreme Court of Tennessee is hereby granted and clothed with general supervisory control over all the inferior courts of the state. [Acts 1970 (Adj. S.), ch 422, §1.]

Cross-References. Vesting of judicial power, §16-101.

16-331 Supervisory procedures.—In addition to other constitutional, statutory and inherent power, but not restrictive thereof, the Supreme Court shall have the power: _____

e. To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.

f. To take all such other, further and additional action as may be necessary to the orderly administration of justice

within the state, whether or not herein or elsewhere enumerated. [Acts 1970 (Adj. S.), ch. 422, §2.]

Cited:Cantor v. Brading (1973), — Tenn. App. —, 494 S. W. (2d) 139.

16-332. Inherent power of court.—The general assembly hereby declares that §§ 16-330—16-333 are declaratory of the common law as it existed at the time of the adoption of the constitution of the state of Tennessee, and of the power inherent in a court of last resort. [Acts 1970 (Adj. S.), ch. 422, §3.]

Cited:Cantor v. Brading (1973), — Tenn. App.—, 494 S. W. (2d) 139.

16-333. Plenary and discretionary powers.—Sections 16-330—16-333 shall constitute a broad conference of full, plenary and discretionary power upon the Supreme Court. [Acts 1970 (Adj. S.), ch. 422, §4.]

27-120. Written opinions in Supreme Court.—The judges of the Supreme Court shall give written opinions, stating the points of law on which the action of the court is based, in all cases determined by them, except actions in which there is no defense. [Code 1858, §3931 (deriv. Acts 1829, ch. 60, §2); Shan., §5735; Code 1932, §9924.]

49-201. Duties of quarterly county court.—The duties of the quarterly county court shall be:

(1) To elect members of the county board of education and to fill all vacancies on said board except in counties where the board is elected by the people; also to elect county superintendents in certain counties where this is required by law; and to fill a vacancy when it occurs in the office of county superintendent, where they have elected same.

(2) To consider, on the recommendation of the county board of education, school budgets for the county elementary and county high schools, and to provide necessary funds to enable said county board to meet all obligations under the adopted budgets.

(3) To require the county board of education, through the

county superintendent, to make a quarterly report of the receipts and expenditures of the public school funds, the needs of the county elementary and the county high schools, the progress made in their development and such other information as to the administration of the public schools as it may require.

(4) To require its finance committee to examine the accounts of the county board of education quarterly, or at any other time it may appear that said county board is misusing any of the public school funds, or exceeding the budget adopted by said court; or it may appoint a competent auditor to make said examination, the cost of such examination to be paid out of county funds.

(5) *To submit to the voters of the county,* at any regular session, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.

(6) To levy such tax as may be necessary to pay interest on bonds and to provide a sinking fund to retire same at maturity.

(7) To levy such taxes for county elementary and county high schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the quarterly county court.

(8) To levy sufficient taxes or provide funds by bond issues by the voters for the purchase of school grounds, the erection and repair of school buildings, and for equipping the same; provided, same shall have been provided for by the quarterly court, or that said court shall have approved the authorization of same by the county board of education.

(9) To provide sufficient funds to erect a suitable building and maintain at least one (1) first-class four (4) year high school according to the provisions of this title. [Acts 1925, ch. 115, §9; Shan, Supp., §1487a55; mod. Code 1932, §2346.]

49-701. Issuance by county courts authorized.—The counties through their respective quarterly county courts *are authorized* to issue and sell bonds for the purposes and in the manner provided in this chapter. [Acts 1911, ch. 60, §1; Shan., §1442a5; mod. Code 1932, § 2557.]

49-702. Resolution for issuance—Maximum amount outstanding.—Said bonds *may* be issued by the quarterly county court of any county by resolution adopted by a majority of the members of said quarterly county court at any regular, special or adjourned meeting thereof. [Acts 1911, ch. 60, § 11; Shan., § 1442a15; Code 1932, § 2567; Acts 1947, ch. 102, § 3; 1949, ch. 240, § 1; C. Supp. 1950, § 2567; Acts 1957, ch. 92, § 1; 1963, ch. 165, § 1.]

49-102. Administration of system.—The system of public education shall be administered from the state level by (1) the commissioner of education, and (2) the state board of education. There shall be a local public school system operated in each county. There may be a local public school system operated in a municipality or special school district. Any local public school system shall be administered by (1) a local board of education, and (2) a superintendent or director.

Hereinafter in this title, unless specifically designated otherwise, the term school system, public school system, local school system, school district, or local school district shall mean and shall include any county school system, city school system, special school district, unified school system, metropolitan school system, or any other local public school system or school district created or authorized by the general assembly of the State of Tennessee and the term board, local board, or local board of education shall mean and shall include the board of education which manages and controls the respective local public school system. [Acts 1925, ch. 115, § 2; Shan. Supp., § 1487a16; Code 1932, § 2307; Acts 1974 (Adj. S.), ch. 654, § 1.]

49-602. Emergency closing of schools.—Whenever the operation of schools in any county, city, or special district

shall be suspended by reason of epidemic, flood, or other justifiable cause, if so determined by the state board of education, upon the written petition by the local board of education, such suspension shall not operate to deprive any county, city, or special school district of state school funds to which such county, city, or special school district would otherwise be entitled. [Acts 1937, ch. 86, § 1; C. Supp. 1950, § 2417.1; Acts 1957, ch. 144, § 1.]

49-713. Use of fund.—The proceeds of said sale of said bond shall constitute a special fund to be known as "special school fund." (except funds for aiding the state of Tennessee in construction of state education facilities or institutions as provided for in the paragraph below), which shall be kept by the trustees of said county and the treasurer of said city schools separate and apart from all other funds and shall be applied exclusively to purchase property for school purposes, to purchase sites for school buildings, to erect or repair school buildings, to furnish and equip school buildings and to refund, call or make principal and interest payments on bonds previously issued for the same purposes, and to be used for no other purposes by the county board of education of said county or by the city board of education, or the governing board of the city, which said city board shall have a right to draw warrants on said funds, for said purposes only.

Funds may also be raised by counties in this state in accordance with the provisions of this chapter for the purpose of contributing or granting the same to the state of Tennessee to aid in the constructing and equipping of any type of state educational facilities or institutions within the boundaries of such counties, or neighboring counties nearby enough so that the contributing county will be directly benefited by such facilities or institutions, either separately or in conjunction with other political subdivisions. Funds for this latter purpose shall be paid to the state of Tennessee immediately upon the sale of bonds for that purpose by such

counties rather than being kept by the trustee in such counties as a part of the "special school fund" provided for above.

The provisions of § 49-711, of this Code "Proportional Payments to Cities," shall not apply when the proceeds from the bonds are to be used for this last purpose mentioned. [Acts 1911, ch. 60 § 10; Shan., § 1442a14; Code 1932, § 2566, Acts 1959, ch. 254 §1; 1961, ch. 269, § 2; 1965, ch, 134, §1; 1975, ch. 223, § 1.]

49-1105. Senior high school in county required—Number of pupils required for additional schools.—There shall be maintained in each county of the state one (1) senior high school which shall give at least one (1) full course of study approved by the state board of education. Local boards of education may establish additional high schools; provided, that no junior high school of form I shall be established and maintained with fewer than seventy-five (75) pupils in average daily attendance; and that no junior high school of form II may be established and maintained with fewer than one hundred (100) pupils in average daily attendance, thirty (30) of whom shall have completed the eighth grade or its equivalent; and that no junior high school of form III shall be established and maintained with fewer than one hundred fifty (150) pupils in average daily attendance; sixty (60) of whom shall have completed the eighth grade or its equivalent; and that no senior high school shall be established and maintained with fewer than three hundred (300) pupils in average daily attendance; provided that any senior high school in a state of transition may be initially established with fewer than three hundred (300) pupils in average daily attendance, provided that as soon as the period of transition has been completed that such senior high school shall not have fewer than three hundred (300) pupils in average daily attendance; provided further that nothing in this chapter shall prohibit the consolidation of any two (2) or more high schools now established, into one (1) high school, even

though the combined average daily attendance of the pupils in such consolidated high school is less than that required in this chapter; and provided that nothing in this chapter shall be construed as abolishing any high school now established. It is further provided that local boards of education may, in unusual circumstances, establish and maintain high schools with fewer pupils in average daily attendance than is prescribed herein; provided that prior approval for such is granted by the state commissioner of education and the state board of education upon request of the respective local board of education. It is also further provided that local boards of education shall designate the schools which the pupils shall attend. [Acts 1925, ch. 115, § 14; Shan. Supp., § 1487a94; Code 1932, § 2385; Acts 1931, ch. 71, §; 1937 (2nd E. S.), ch. 6, § 1; 1937 (3rd E. S.), ch. 15, § 1; 1943, ch. 65, § 1; mod. C. Supp. 1950, § 2393.7; Acts 1957, ch. 145, § 1; 1961, ch. 137, § 1; 1974 (Adj. S.), ch. 654, § 50.]

49-105. Powers and duties of commissioner. — The commissioner shall be, ex officio, member and chairman of the state board of education, and shall have a vote on all questions coming before the board, and it shall be the duty of said commissioner of education:

(1) To appoint all heads and subordinates in the department and divisions thereof, except supervisor of agriculture, supervisor of trades and industry, supervisor of home economics, supervisor of rehabilitation who shall be elected by the state board of education, who shall fix their compensation subject to the approval of the federal board, if required, except teachers and other county school officers. All appointments made by the commissioner shall be made subject to the governor's approval.

(2) To collect and publish statistics and other information relative to the public school system.

(3) To make tours of inspection and survey among the public schools throughout the state and to direct supervision through the divisions of the department.

(4) To require all teachers to attend county institutes or educational meetings on the date, at the hour and place designated by the county superintendent; provided, schools shall not be suspended for more than ten (10) days in one (1) year, and, provided further, that the place of such meeting shall be in the county where the school is located.

(5) To see that the school laws and the regulations of the state board of education are faithfully executed.

(6) To prepare and distribute blank forms for all reports required by law or by said commissioner to be made by teachers, boards of education, superintendents, county trustees, and all other state, county, and city officers.

(7) To print and distribute to the local boards of education and all state, county and city school officers copies of the school law.

(8) To require of all state and local public school officers and heads of state educational institutions under the department of the state board of education detailed reports annually, and, in case of emergency, he may require special reports at any time of any officer connected with the public school system.

(9) To appoint someone to make reports required to be made by the state or local public school officers and head of state institutions named herein when such officers shall fail to make full and accurate report at the time designated and to allow such appointee compensation not to exceed five dollars ($5.00) per day for the time actually employed in making such report for his service which shall be paid by the delinquent public school officer or head of state educational institution. Upon the refusal of said delinquent officer or head of state educational institution to pay such compensation the commissioner shall deduct that amount out of the state supplement to his salary or compensation and require the county trustee or other custodian of public school funds to withhold said amount out of any salary which may be due such delinquent officer.

(10) * * *

(14) To revoke when charges are made and approved by the superintendent and local board of education upon sufficient evidence the certificate of any teacher, principal, supervisor, or other school official who is guilty of immoral conduct, provided, that said teacher, principal, supervisor, or other official shall be given ten (10) days' notice in writing and an opportunity to appear in defense.

(15) Whenever it shall appear to the commissioner of education from the report of any school official or from any other reliable source that any portion of the school fund has been lost, misappropriated, or in any way illegally disposed of, or not collected, or is in danger of loss, misappropriation, illegal disposition or failure of collection, the commissioner may call upon the district attorney or county judge or chairman of the county court, or the county attorney, to protect, recover, or force collection of such funds, provided the governor shall first give his approval to such action. This provision, however, shall not prohibit suits by one political subdivision against another political subdivision in the same county, or against the county, when the consent of the state commissioner of education and the governor has not been obtained. The state commissioner of education, with the consent of the governor and with the approval of the attorney-general, is hereby authorized to employ private legal counsel in order to protect, recover, or force collection of any school funds.

The commissioner shall have authority to send a supervisor or supervisors as herein provided for, to any local school system to make investigation of public school accounts, records, and files of any official handling the school funds or administering the public school system, and to enforce all school laws and regulations of the commissioner of education provided that this duty of the commissioner shall not be exercised until the local board of education shall have requested such investigation.

(16) To supervise high schools and to furnish blank forms in accord with the provisions of this title.

(17) To prescribe regulations regarding the display of flags on public school buildings.

(18) To require the heads of divisions under his direction who handle state funds to give bonds sufficient to cover any liability to the state.

(19) To inspect, approve and classify such private schools of grades one (1) through twelve (12), as well as nursery schools and/or kindergartens, or any combination of these, as shall request such inspection, approval, and classification; provided that the same standards as are used for the approval and classification of the public schools shall be used for such inspection, approval, and classification. [Acts 1925, ch. 115, § 4; Shan. Supp., § 1487a23; Code 1932, § 2314; Acts 1933, ch. 129, §; C. Supp. 1950, §2314; impl. am. Acts 1951, ch. 58; 1957, ch. 91, §§ 1, 2; 1961, ch. 106, § 1; 1961, ch. 160, § 1; 1963, ch. 13, § 1.]

49-604. B. In order for any public school system to receive the state funds appropriated for the minimum foundation school program as determined in § 49-603, such system shall meet the following *conditions and requirements*. In order to enforce the same, the state commissioner of education may, *in his discretion*, withhold a portion or all of the state school funds which the system is otherwise eligible to receive.

1. Every school system shall meet the requirements of state law as to the operation of such system.

2. Every school system shall meet the rules, regulations, and minimum standards established by the state board of education for the location, construction, and operation of schools.

3. Every school in every school system shall meet the requirements of the state board of education for an approved school. [Acts 1925, ch. 115, § 17; Shan. Supp., § 1487a124; Code 1932, § 2416; Acts 1972 (Adj. S.), ch. 693, § 6.]

20-210. Process to other counties. — Process in local actions may run to any county. [Code 1858, § 2820; Shan., § 4525; Code 1932, § 8652.]

Text Books. History of a Lawsuit (7th Gilreath), § 42.

Collateral References. 72 C. J. S., ed., 42.

20-211. Counterpart summons. — Where there are two (2) or more defendants in any suit in courts of law or equity, or before justices of the peace, the plaintiff may cause counterpart summons or subpoena to be issued to any county where any of the defendants is most likely to be found, the fact that the counterpart process is issued in the same suit being noted on each process, which, when returned, shall be docketed as if only one process had issued. If the defendants are not served, the same proceedings shall be had as in cases of other similar process not executed. Such counterpart, when issued from a justice, shall be returned within thirty (30) days. [Code 1858, §§ 2821, 2822 (deriv. Acts 1820, ch. 25, § 3); Shan., §§ 4526, 4527; Code 1932, §§ 8653, 8654.]

16-624. Action in personam. — The court of chancery acts ordinarily in personam, and suit may be instituted wherever the defendant, or any material defendant, is found, unless otherwise prescribed by law. [Code 1858, § 4305; Shan., § 6115; Code 1932, § 10383.]

16-626. Process to other counties in general. — In like manner, if the suit is properly instituted, attachments, injunctions, and all other process known to the court, and necessary to attain the ends of justice, may be issued to any other county. [Code 1858, § 4307; Shan., § 6117; Code 1932, § 10385.]

16-617. Venue of suits. — The local jurisdiction of the court of chancery is also subject to the following rules:

(1) The bill may be filed in the county in which the defendant or a material defendant resides, and if, upon inquiry at his residence, he is not to be found, he may be proceeded against by publication or judicial attachment.

(2) All bills filed in any court seeking to divest or clear the title to land, or to enforce the specific execution of contracts relating to realty, or to foreclose a mortgage or deed of trust by a sale of personal property or realty, shall be filed in the county in which the land, or a material part of it, lies, or in which the deed or mortgage is registered.

(3) Bills seeking to enjoin proceedings at law may be filed in the county in which the suit is pending, or to which execution has issued.

(4) Bills against nonresidents, or persons whose names or residences are unknown, may be filed in the county in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which is the subject of the suit, or any material part thereof.

(5) When attachment of property is allowed in lieu of personal service of process, the bill may be filed in the county in which the property, or any material part thereof, sought to be attached, is found at the commencement of the suit. [Code 1858, § 4311 (deriv. Acts 1787, ch. 22, § 1; 1801, ch. 6, § 2; 1825, ch. 22, §§ 1, 2; 1827, ch. 42, § 1; 1833, ch. 52); Acts 1877, ch. 107, § 1; Shan., § 6121; Code 1932, § 10388.]

DECLARATORY JUDGMENTS

23-1101. Definition of person. — The word "person" wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or *municipal* or *other corporation of any character whatsoever.* [Acts 1923, ch. 29, § 13; Shan. Supp., § 4726a13; Code 1932, § 8847.]

23-1103. Construction of statutes and written instruments. — *Any person interested* under a deed, will, *written contract, or other writings* constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising

under the instrument, *statute,* ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. [Acts 1923, ch. 29, § 2; Shan. Supp., § 4726a2; Code 1932, § 8836.]

23-1107. Parties to proceedings. — When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, *such municipality shall be made a party,* and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard. [Acts 1923, ch. 29, § 11; Shan. Supp., § 4726a11; Code 1932, § 8845; mod. C. Supp. 1950, § 8845.]

BONDS AND NOTES

5-1024. Election — When required. — No vote of the registered voters upon a proposition for the issuance of bonds by any county shall be necessary if the said initial resolution is adopted by a majority of the members of the governing body of such county unless within ten (10) days of the date of publication or posting, as the case may be, of the initial resolution so adopted, a petition, signed by at least ten per cent (10%) of the registered voters of the county, or of that portion thereof which is liable to be taxed therefor, as the case may be, shall have been filed with the county court clerk protesting the issuance of the bonds. If a petition protesting the issuance of such bonds signed by as many as ten per cent (10%) of the registered voters as aforesaid shall have been filed with the county court clerk within ten (10) days from the publication or posting of the initial resolution, then no bonds shall be issued without the assent of a majority of the registered voters affected thereby voting

upon a proposition for the issuance of such bonds in the manner provided by § 5-1025. No registered voter shall be permitted to withdraw his signature from such petition after signing the same. Notwithstanding any of the provisions of this section the governing body of the county may if it desires call an election as provided herein for the purpose of ascertaining the will of the registered voters with respect to the issuance of the bonds. [Acts 1957, ch. 224, § 1; 1972 (Adj.S.), ch. 740, § 4(6).]

5-1001. Popular vote to authorize bonds — Exceptions. — Any bonds authorized to be issued by any of the counties, upon the faith and credit of such county, for public purposes, shall only be upon an election to be first held by the registered voters of such county and the assent of a majority of the votes cast in said election; provided, that nothing in this section shall be construed as applicable to renewal or refunding bonds; provided, further, that nothing in this section shall be construed as applicable to the issuance of bonds for the building of a courthouse in any county in which the courthouse has been destroyed. Nothing in this section shall interfere with or affect any present enabling act for state and federal aid for the construction of state and federal roads. [Acts 1923, ch. 69, §§ 1, 2; Shan. Supp., §§ 6054a11, 6054a12; Code 1932, §§ 10248, 10249; Acts 1931, ch. 13, § 1; C. Supp., 1950, § 10248; Acts 1972 (Adj.S.), ch. 740, § 4(4).]

TENN RULES OF CIVIL PROCEDURE

12.08. Waiver of Defenses

A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or, if he has made no motion, in his answer or reply, or any amendments thereto, (provided, however, the defenses enumerated in 12.02(2), (3), (4) and (5) shall not be raised by amendment), except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to

state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 in the light of any evidence that may have been received.

Committee Comment: Rule 12.08 specifies that, in general, defenses not raised by motion or answer are waived, but the waiver does not apply to the defense of lack of jurisdiction over the subject matter and certain other specified defenses relating to statement of legally sufficient claim or defense, or to failure to join necessary parties. *The parties cannot by waiver or otherwise confer jurisdiction over the subject matter,* and the other exceptions relate to questions which should not be waived; the defects they rely upon can be remedied by amendment if facts permit, and if the facts do not permit an amendment, the defects are of such importance that the defenses based thereon should not be waivable by failure to present them at the earliest opportunity.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-117

Supreme Court, U. S.
FILED
AUG 3 1976
MICHAEL RODAK, JR., CLERK

EDWARD MITCHELL, HOWARD N. SHEPHARD, CALVIN T. REDDEN, JAMES T. OAKES,

Plaintiffs

VS.

BENJAMIN E. CARMICHAEL, Commissioner of Education of the State of Tennessee; MILTON P. RICE, Acting Attorney General and Reporter for the State of Tennessee; THE LINCOLN COUNTY QUARTERLY COURT, composed of LYLE M. FRANKLIN, W.F. PHILPOT, JOE D. TAFT, FRANK E. GRAHAM, HOWARD CAPSHAW, HOWARD MONKS, V.H. BARNES, BILLY PARKER, PAUL BARHAM, CECIL ELLIS, PANGLE STEWART, WM. R. CARTER, FRED YOUNG, J.T. WYATT, WM. S. JAKOVINA, HERMAN MONTGOMERY, L.C. CURTIS, JOHNNY STEVENSON, H. PARSONS, JR., FREEMAN TOWRY, DR, T.H. BULLINGTON, KNOX STEWART, CECIL COOKE, CLYDE FORRESTER, ROY SWEENEY, CON. S. MASSEY, E.C. COLLINS, THOS. E. HUDSON, MELVIN HOWELL, J.T. WALKER, LEONARD MANSFIELD and EARL VANN; TAYLOR CRAWFORD, County Judge and fiscal agent of Lincoln County, Tennessee; the Board of Education of Lincoln County, Tennessee, composed of ERNEST PENDERGRASS, BRIMAGE L. SMITH, WM. T. MEDLEY, JAS. W. SMITH, R. E. BURROUGHS, C.H. HARDY, TULLY BUCHANON, WM. D. JONES and JOHN T. TOWRY; RICHARD WAGGONER, Administrator of the Lincoln County School System, the Board of Education of the State of Tennessee composed of NOBEL C. CAUDILL, T.M. DIVINE, JOHN K. FOLGER, THOMAS E. GERAGHTY H. LYNN GREER, JR., JAMES W. HAWKINS, EDWARD L. JENNINGS, HUGH T. MCDADE ANDREW J. PAYNE, JR., MRS. C. LENTZ STEVENS, F. THORNTON STRANG, MS. DORIS B. TANNER, BENJAMIN E. CARMICHAEL, STEPHEN DENNIS, GEORGE H. BARNES, KENNETH EZELL, DALE GLOVER, JAMES H. JONES, JR., EDWIN H. KENNEDY, FRANK TAYLOR and GOVERNOR WINFIELD DUNN.

Consolidated with

Edward Mitchell, Howard Shephard, Calvin T. Redden, James T. Oakes

VS

(**Same Defendants** except County Judge Taylor Crawford is named as primary defendant instead of Benjamin E. Carmichael Commissioner of Education)

[redacted] CORRECT ERRORS IN PETITION

by submitting

APPENDIX A - SUPPLEMENT

and a complete

CORRECTED INDEX

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Attorney for Complainants

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

MITCHEL, et al

Petitioner

VS.

CRAWFORD, et al

Respondents

ON PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The petitioner moves the court for leave to correct certain errors in petition advertently occurring in the final preparation of copy for printing in the following respects:

1. By listing cases in alphabetical order instead of order of citation.

2. By entering certain statutes in the Index to Petition inadvertently omitted.

3. By entering a separate index to Petition for Writ of Certiorari, and to Appendix A & A - Supplement as to all statutes and all constitutional provisions including those not included in the original Appendix A and here added in Appendix A - Supplement.

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented for Review	2
Constitutional and Statutory Questions Involved	7
Statement of the Case	7
Argument	13
Conclusion	54
Appendix A	A.1

Authorities Cited
TENNESSEE CODE ANNOTATED

Page		Page
§ 16-617 (4)	14	**§ 49-201 (5)** 21-22-23-25-26-27-29-50-51
§ 23-1101	14	**§ 1-303** 28
§ 16-625	14	**§ 5-1024** 27-28
§ 20-210	14	**§ 49-102** 30
§ 20-211	14	**§ 49-214** 30
§ 23-1107	14	**§ 49-215** 30
§ 23-2003	15	**§ 49-224** 30
§ 53-3422	16	**§ 49-1105** 30
§ 53-3417	16	**§ 49-105** 31-36
§ 53-3415	16	**§ 49-604** (B) 1, 2 and 3 31
§ 27-120	18-52	**§ 49-602** (E) 9 and 10 32
§ 16-330-1-2-3	3	**§ 49-1105** 36
§ 49-701-2	26-29-20	**§ 23-1113** 48
§ 49-713	20	**§ 17-202-3** 53
§ 5-1001 ...20-21-23-26-27-28-29-50		**§ 16-625** 14
§ 5-1024	28	**§ 16-617** 14

CASES
in alphabetical order

Adams v. State ex rel Chattanooga Coke
514 S.W.2d 424 15

Barnette v. West Virginia
63 S. Ct. 1178, 319 U.S. 624 47

Blonder-Tongue Labs v. University Foundation
402 U.S. 313, 329 19

Board of Park Commissioners v. Nashville
134 Tenn. 612, 629 28

Buntin v. Crowder
273 Tenn. 398, 118 S.W.2d 221 48

Burns v. Duncan
23 Tenn. App. 374 25

Chamberlin v. State ex rel Scott W. Brown
387 S.W.2d 816 14

Cheatham v. Baker
161 Tenn. 222 38

Citizens to Preserve Overton Park v. Volpe
357 F. Supp 846 (1973) 38

Colburn v. Chatt
2 Shannon 22 (Tenn.) 45

Crewse v. Beeler
186 Tenn. 475 20-50

Delta Loan Finance Co. v. Long
206 Tenn. 709 336 S.W.2d 5 14

Engle v. Vitale
370 U. S. 421 48

Estes v. Texas
381 U.S. 532, 543 (1965) 54

Evers v. Dwyer
358 U.S. 202 48

Flast v. Cohen
392 U.S. 83 48

Garner v. Scales
183 Tenn. 577, 194 S.W.2d 452 37

Gibson v. Berryhill
U.S. 36 L Ed 2d 488 (1973) 54

Illinois Central R.R. Co. v. Memphis
21 Tenn. App. 327, 110 S.W.2d 352 25

In re Murchison
349 U.S. 133 (1965) 54

Jack's Cookie Corp. v. Giles County
219 Tenn. 131, 407 S.W.2d 446 (1966) 14

Joint Anti-Facist Refugee Committee v. McGrath
341 U.S.123 52
Katzenberger v. Weaver
110 Tenn. 620 25
K V O S Inc. v. Associated Press
299 U.S. 269, 57 S. Ct. 197, 81 L Ed 183 24
Lamb v. State
338 S.W.2d 584, 207 Tenn. 162 51
Malone v. Williams
118 Tenn. 390 35
Mayer v. Chicago
404 U.S. 189 (1971) 54
Pierce v. Society of Sisters
268 U.S. 510 47
Pollack v. Farmers Loan and Trust Co.
157 U.S. 429, 15 S. Ct. 673, 39 L Ed. 759 24
Prescott v. Duncan
126 Tenn. 106 34
Railroad v. Lee
95 Tenn. 388 38
Reams v. Mayor and Board of Aldermen of McMinnville
155 Tenn. 222 45
Sanders v. Carmichael
527 S.W.2d 92 (1975) 44-49
Schecter Poultry v. U.S.
295 U.S. 495, 44 S. Ct.837, 79 L Ed. 1570 34
Scott v. McNeal
154 U.S. 34-46 53
Shelby County Board of Commissioners v. Shelby Quarterly Court
216 Tenn. 470, 392 S.W.2d 935 (1965) 14
Southern v. Beeler
183 Tenn 272, 195 S.W.2d 857 50
State ex rel Harbin v. Dunn
39 Tenn. App. 190 18-23
State ex rel Harned v. Meador
154 Tenn. 634 22

State ex rel Lea v. Brown
166 Tenn. 669, 91 ALR 1246 24
State v. Mathews
143 Tenn. 475, 13 ALR 314 24
State ex rel v. Nashville Baseball Club
127 Tenn. 292, 307 24
State ex rel v. Safley
172 Tenn. 385 19-23-50
State v. Yoakum
299 S.W. 635 38
Wilds v. Coggins
496 S.W.2d 496 (1973).....27-50
Williams v. American Plan Corp.
216 Tenn. 435, 392 S.W.2d 920 48
Winters v. American Trust
158 Tenn. 479, 14 S.W.2d 740 24

INDEX TO APPENDIX A
AND
APPENDIX A-SUPPLEMENT

CONSTITUTION OF TENNESSEE

Article I, Sec. 1 .....A-1
Article I, Sec. 2 .....A-1
Article I, Sec. 5 .....A-2
Article I, Sec. 8 .....A-2
Article I, Sec. 21 .....A-2
Article II, Sec. 1 .....A-2
Article II, Sec. 2 .....A-2
Article II, Sec. 3 ..... A-Supp.-V
Article II, Sec. 17 ..... A-Supp.-V
Article II, Sec. 29 ..... A-Supp.-V
Article VI, Sec. 2 ..... A-2
Article VI, Sec. 11 ..... A-3
Article XI, Sec. 17 ..... A-Supp.-VI

TENNESSEE CODE ANNOTATED

	Page
§ 16-330	A-3
§ 16-331	A-3
§ 16-332	A-4
§ 16-333	A-4
§ 27-120	A-4
§ 49-201	A-4
§ 49-701	A-6
§ 49-702	A-6
§ 49-102	A-6
§ 4-404	A-Supp.-VI
§ 49-602	A-6
§ 49-713	A-7
§ 49-1105	A-8
§ 49-105	A-9
§ 49-604 B	A-12
§ 49-2709 (a) (b) (c)	A-Supp.-VII
§ 20-210	A-13
§ 20-211	A-13
§ 16-624	A-13
§ 16-625	A-Supp.-VII
§ 16-626	A-13
§ 16-617	A-13
§ 23-1101	A-14
§ 23-1103	A-14
§ 23-1107	A-14
§ 5-1024	A-15
§ 5-1001	A-16
§ 1-303	A-Supp.-VI

TENNESSEE RULES OF CIVIL PROCEDURE

Rule 12.08 ..... A-16

CONSTITUTION OF TENNESSEE

Article II, Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Article II, Sec. 17. Origin and frame of bills.—No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended.

Article II, Sec. 29. Counties and towns—Power to tax—Credit.—But the credit of no County, City or Town shall be given or loaned to or in aid of *any person,* company,

association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election.

Article XI, Sec. 17. County offices.—No County office created by the Legislature shall be filled otherwise than by the people or the County Court.

Compiler's Notes. The provision in this section originated with this Constitution, and was not in the previous Constitutions. See Prescott v. Duncan (1912), 126 Tenn. 106, 148 S. W. 229.

The provision in this section was doubtless incorporated into the Constitution of 1870 on account of the condition of the government existing at the time of the meeting of the constitutional convention, and just prior thereto, and to insure against the repetition of such condition, which was caused by the affliction of an orgie of commissioners appointed from Nashville, many of them hostile in sentiment and conduct to the people over whom they were set, and most of them appointed because of such hostility. See Prescott v. Duncan (1912), 126 Tenn. 106, 148 S. W. 229.

TENN CODE ANNOTATED

1-303. Conflicts within Code.—If provisions of different titles or chapters of the Code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter. [Code 1932, § 13; modified.]

4-404. Central offices—Branches.—Each department shall maintain a central office at the capitol, which shall be the official residence of each commissioner, or head of department. The commissioner of each department may in his discretion and with the approval of the governor, establish and maintain at places other than the seat of government, branch offices for any one or more functions of his department.

16-625. Counterpart summons.—Counterpart summons, accompanied by copies of the bill, may be issued to any other counties of the state for defendants not to be found in the county in which the suit is properly brought.

49-2709. Provision for comprehensive vocational and technical education in grades 9 through 12.—It is further declared to be the intent of the general assembly of the state of Tennessee that comprehensive vocational and technical education be made available by the state and local education agencies in grades nine (9) through twelve (12).

(a) Comprehensive High Schools. Facilities will be utilized and/or expanded in school systems where schools have been consolidated sufficiently to provide comprehensive high schools for a minimum of about fifteen hundred (1500) students.

(b) Area Vocational-Technical Schools. Facilities will be utilized and/or expanded in area vocational-technical schools, where properly located, to provide comprehensive high school vocational training.

(c) Vocational Training Centers. In counties, including city and special school districts, with two or more high schools, where students cannot be served under the provisions of item (a) or item (b) of this section, a vocational training center will be established separate from any existing school.

Supreme Court, U. S.
FILED
16 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1171

EDWARD MITCHELL, HOWARD N. SHEPHARD, CALVIN T. REDDEN, JAMES T. OAKES,

Plaintiffs

VS.

BENJAMIN E. CARMICHAEL, Commissioner of Education of the State of Tennessee; MILTON P. RICE, Acting Attorney General and Reporter for the State of Tennessee; THE LINCOLN COUNTY QUARTERLY COURT, composed of LYLE M. FRANKLIN, W.F. PHILPOT, JOE D. TAFT, FRANK E. GRAHAM, HOWARD CAPSHAW, HOWARD MONKS, V.H. BARNES, BILLY PARKER, PAUL BARHAM, CECIL ELLIS, PANGLE STEWART, WM. R. CARTER, FRED YOUNG, J.T. WYATT, WM. S. JAKOVINA, HERMAN MONTGOMERY, L.C. CURTIS, JOHNNY STEVENSON, H. PARSONS, JR., FREEMAN TOWRY, DR. T.H. BULLINGTON, KNOX STEWART, CECIL COOKE, CLYDE FORRESTER, ROY SWEENEY, CON. S. MASSEY, E.C. COLLINS, THOS. E. HUDSON, MELVIN HOWELL, J.T. WALKER, LEONARD MANSFIELD and EARL VANN; TAYLOR CRAWFORD, County Judge and fiscal agent of Lincoln County, Tennessee; the Board of Education of Lincoln County, Tennessee, composed of ERNEST PENDERGRASS, BRIMAGE L. SMITH, WM. T. MEDLEY, JAS. W. SMITH, R. E. BURROUGHS, C.H. HARDY, TULLY BUCHANON, WM. D. JONES and JOHN T. TOWRY; RICHARD WAGGONER, Administrator of the Lincoln County School System, the Board of Education of the State of Tennessee composed of NOBEL C. CAUDILL, T.M. DIVINE, JOHN K. FOLGER, THOMAS E. GERAGHTY H. LYNN GREER, JR., JAMES W. HAWKINS, EDWARD L. JENNINGS, HUGH T. MCDADE ANDREW J. PAYNE, JR., MRS. C. LENTZ STEVENS, F. THORNTON STRANG, MS. DORIS B. TANNER, BENJAMIN E. CARMICHAEL, STEPHEN DENNIS, GEORGE H. BARNES, KENNETH EZELL, DALE GLOVER, JAMES H. JONES, JR., EDWIN H. KENNEDY, FRANK TAYLOR and GOVERNOR WINFIELD DUNN.

Consolidated with

Edward Mitchell, Howard Shephard, Calvin T. Redden, James T. Oakes

VS

(**Same Defendants** except County Judge Taylor Crawford is named as primary defendant instead of Benjamin E. Carmichael Commissioner of Education)

APPENDIX B TO PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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INDEX TO APPENDIX B

White vs. Warf

1. Bill for Declaratory Judgment (Complaint) B-1
2. Amended Bill (through clerical error not served and hence not answered or considered by the Court) B-17
3. Opinion of Supreme Court of Tennessee (affirming Chancellor's upholding Defendants demurrer) B-21

Young vs. Warf

1. Complaint B-27
   1 (a) Amendment B-45
2. "Per Curiam Memorandum" B-47

Mitchel vs. Carmichael (Ingram)

1. Complaint (Davidson County Chancery) B-49
2. Memorandum B-68
3. Decree B-69
4. Orders (new Trials denied) B-72-73
5. Tennessee Supreme Court Opinion in re-interlocutory appeal B-74
6. Denial of Petition to Rehear and Motion to Re-cuse B-78
7. Tennessee Supreme Court Opinion on Writ of Error (final appeal) B-79

Mitchel v. Crawford (Lincoln County Chancery)

1. Amended Complaint adding children as parties (Original complaint identical with Mitchel v. Carmichael supra.) B-81

2. Court of Appeals Opinion (Includes Chancellors Decree) B-82
3. Per Curiam Order of Denial of Writ of Error . B-97
4. Order denying request to re-hear Henry J not participating B-98

Stewart vs. Wakefield

1. Complaint B-99
2. Chancellors Order B-118
3. Motion to Re-cuse B-121
4. Tennessee Supreme Court Opinion B-122
5. Petition to Re-hear B-125
6. Denial B-134
7. Second Petition to Re-hear with letter to Justice Harbison as requested B-135-7
8. Denial B-147

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

ALTON WHITE, CARL A. WOODARD, TALMAGE PIERCE, JAMES E. THORNE and BILLY BASSHAM

Complainants

VS.

J. H. WARF, Commissioner of Education of the State of Tennessee, DAVID PACK, Attorney General and Reporter for the State of Tennessee, JOE C. CARR, Secretary of State, The State of Tennessee, THE GILES COUNTY QUARTERLY COURT, composed of HOMER D. BOGGS, CLARK WILKINSON, JOHN L. TUCKER, ROBERT L. BIRDSONG, TILLMAN DAWES, HORACE DURHAM, DICKSON MARKS, I. G. WILBURN, MARK DUNNAVANT, WILFRED HELTON, J. W. MOORE, J. D. WOODARD, BURROW McNEESE, ROBERT ROBINSON, FOSTER E. ARNOLD, BILL CHEATHAM, W. LAMBETH LESTER, GEORGE WORSHAM, JACK B. HENRY, TILLMAN CARVELL, W. T. EARHEART, AND SAM WILSON, C. G. DAVIS, County Judge of Giles County, Tennessee

Defendants

FILED
JUNE 22, 1970
EMILY LORD
DEPUTY C & M

BILL FOR A DECLARATORY JUDGMENT

The complainants respectfully show to the Court:

I.

That the complainants are citizens, property owners, or freeholders, tax payers and parents of children attending the public schools of Giles County, Tennessee. They bring this suit for themselves and others similarly situated as representatives of a class that have common interests and are so numerous as to make it impracticable to bring them before this Court individually. As some indication of the general concern among residents of Giles County of the matters herein, a list of Petitioners to the Court and their Petition is attached hereto as Exhibit "A" but need not be copied for issuance of process.

II.

The defendant, J. H. Warf is Commissioner of Education of the State of Tennessee and as such is the administrator of funds of the Department of Education under statutory provisions here sought to be construed.

The defendant, David Pack, is the Attorney General and Reporter for the State of Tennessee, and is made a party defendant to the action under the provisions of T.C.A. Section 23-1107.

The defendant, Joe C. Carr, is Secretary of State for the State of Tennessee and is the agent for service of process upon the State of Tennessee and its officials.

The defendant, C. G. Davis, County Judge of Giles County, Tennessee and the members of the Court are made defendants in their capacities as the legislative body appropriating certain funds for the public school system of Giles County, Tennessee.

The defendants, Homer D. Boggs, Clark Wilkinson, John L. Tucker, Robert L. Birdsong, Tillman Dawes, Horace Durham, Dickson Marks, I. G. Wilburn, Mark Dunnavant,

Winfred Helton, J. W. Moore, J. D. Woodard, Burrow McNeese, Robert Robinson, Foster E. Arnold, Bill Cheatham, W. Lambeth Lester, George Worsham, Jack B. Henry, Tillman Carvell, W. T. Earheart, and Sam Wilson are made defendants in their capacity as members of the Quarterly Court of Giles County, Tennessee.

III.

That the 86th General Assembly of the State of Tennessee in 1969 enacted the 1969 Public School Laws in Tennessee, Chapter 294, Section 21 of which provides:

> SECTION 21. BE IT FURTHER ENACTED, That the State Commissioner of Education is hereby authorized and empowered to withhold minimum foundation school program funds for current operation and maintenance for public schools, grades one through twelve, or capital outlay funds distributed under the provisions of this Act, or both, from any county, city, or special school district system which has within such school system a school which does not meet the requirements of the State Board of Education for an approved school.

That on June 18, 1969, The Tennessee State Board of Education and J. H. Warf, Commissioner, adopted "Rules, Regulations, and Minimum Standards" and published same in pamphlet form. There is no authority cited under which these "Rules and Regulations" are promulgated nor is there any specific authority for same recorded in Tennessee Code Annotated.

The Rules and Regulations are attached and made a part hereof but need not be copied for issuance of process. Exhibit "B" they set out strigent and detailed requirements under the general headings of:

I. Administrative Rules and Regulations

II. Minimum Requirements for the Approval of Public Schools

III. Minimum Standards for School Attendance Centers, School Sites, Construction of School Buildings, Major Repairs of School Buildings of a Capital Outlay Nature, and Equipment of School Buildings.

IV. Pupil Transportation and Minimum Standards for School Buses.

V. The National School Lunch, Special Milk, School Breakfast and Other Food Service Programs in the Public Schools of Tennessee-Grades K Through 12.

At the end of Part I, "Administrative Rules and Regulations" on page 29 after all the rules in that section have been set out a general "waiver" is provided as follows:

"The State Commissioner of Education is authorized to grant waivers of any of these rules and regulations."

On page 58, a similar blanket power of waiver is granted in regard to Section II, "Minimum Requirements for the Approval of Public Schools".

On page 69 at the end of Section III (the section on school buildings) a somewhat more restrictive waiver power is granted in that here the commissioner is required to use his discretion before acting. The precise language is:

"The State Commissioner of Education is hereby authorized to grant waivers of any of these standards if in his discretion it seems advisable because of factors which might improve the location or facilities for the total school attendance centers."

For Sections IV and V no power of waiver is granted or assumed.

IV.

The sequence of events culminating in this action are as follows:

On January 9, 1969 Minor Hill High School burned; the

principal structure was totally destroyed. The student body and the faculty were intact but nevertheless the Commissioner of Education declared the school to be not in existence, dissolved and abolished. Mere physical destruction of walls and roof prompted a decision restructuring the educational fabric and the nature of the community.

The School Board journeyed to Nashville to confer with the Commissioner.

On May 26, 1969, Commissioner Warf sent a letter to the superintendent of Giles County Schools in which he advised that he could not consider rebuilding Minor Hill until all schools in the county were brought up to state standards and that the best solution for Giles County was to build one consolidated high school. Commissioner Warf concluded his advice with the following:

"If your Board of Education cannot or will not provide my office with an acceptable plan for improving the schools, supported by necessary funds, then my office will have to take whatever action it deems appropriate to insure the children in Giles County an equitable educational program."

A copy of this letter is attached and made a part hereof, but need not be copied for issuance of process. (Exhibit "C")

In the week of July 8th the School Board proposed that three high schools be closed and that five should remain open. At this point Commissioner Warf ordered state funds withheld from Giles County.

Subsequently the Giles County Board of Education resolved to petition the Quarterly Court in a called session for August 11, 1969, to appropriate $2,900,000.00, $2,500,000.00 of which was to be used to build one consolidated high school in conformance with Commissioner Warf's demands. The School Board pointed out in its resolution that it had never wanted one consolidated high school and was requesting money for same under pressure and threats of Commissioner Warf. A copy of the resolution is attached but need not be

copied for issuance of process. (Exhibit "D")

The County Court in its August 11th meeting considered the resolution and first voted to table and then after some discussion (including long distance phone calls to Commissioner Warf in which he threatened cut off of funds unless the magistrates acceded to his demands) voted to adopt the resolution. As a result, Commissioner Warf reinstated state funds for Giles County. A copy of the proceedings is attached but need not be copied for issuance of process. (Exhibit "E")

In September, citizens circulated a petition requesting the Quarterly Court to conduct a referendum on the general question of consolidated schools. (See Exhibit "A-1").

On October 9th, Commissioner Warf wrote a letter to the Honorable Coleman G. Davis, County Judge of Giles County in which he stated that Chapter 7 of Title 49 T.C.A. makes no provisions for a referendum. He said nothing whatever concerning T.C.A. Sections 49-201 or T.C.A. 5-1001 which do provide for a referendum on bond issues.

Commissioner Warf again threatened to cut off funds if the Quarterly Court did not perform as he directed. A copy of his letter is attached but need not be copied for issuance of process. (Ex. "F")

The Quarterly Court met on October 13th and resolved to defer action on the bond issue and to authorize a referendum "as to whether or not the recommendations of the School Board (for one consolidated high school) be accepted by the court".

Section I of the resolution read: "That for the purpose of providing the necessary funds to meet the proposal as recommended by the Giles County Board of Education to finance the construction of a new Senior High School at Pulaski, Tennessee, a new Junior High School at Minor Hill, Tennessee, and improvements to other schools throughout the County, that there be issued the negotiable interest bearing bond anticipation notes of Giles County, Tennessee,

in a total principal amount not to exceed $2,900,000.00. That said notes shall be designated "School Bond Anticipation Notes" and shall be numbered serially beginning with the number 1. Each of said notes shall be dated as of the date of issuance thereof, shall mature not later than two (2) years thereafter and shall be of such denominations as may be agreed upon by the County Judge and Trustee and the purchaser of said notes."

A copy of the resolution as passed by the Court is attached, but need not be copied for issuance of process. (Col. Ex. "G")

A copy of the initiating resolution which led to the above resolution as passed, is attached hereto but need not be copied for issuance of process. (Ex. "H")

A copy of a petition submitted to the court on this subject and signed by a number of citizens is likewise attached but need not be copied for issuance of process. (Ex. "J")

Immediately afterwards the Court authorized the referendum; Commissioner Warf announced again that he was withholding state funds from Giles County.

The Attorney General of Tennessee issued a ruling that it was the opinion of the Attorney General that the referendum was of no force and effect.

A copy of the opinion is attached but need not be copied for issuance of process.

The last sentence of T.C.A. 5-1024 and the second paragraph of T.C.A. 5-1107 is authority for the action of the magistrates and reads as follows:

> "5-1024. Bonds and Notes—*When Election Required.* - notwithstanding any provisions of this to the contrary the governing body may call an election as provided herein for the purpose of ascertaining the will of the qualified electors with respect to the issuance of the bonds." (See also T.C.A. 5-1107 for similar language; see also paragraph 5 of T.C.A. 49-201).

As a result of Commissioner Warf's withholding order, the Giles County Board of Education on October 22, 1969, closed the school system of Giles County for lack of funds.

On November 7th the Quarterly Court was again called in special session and again refused to authorize a bond issue.

Thereupon severe and various pressures were brought upon the members of the Court and at an informal meeting on November 11th, fourteen magistrates signed a pledge to vote for the bond issue for a consolidated high school.

Upon the basis of this pledge Commissioner Warf then released the school funds for Giles County and the schools re-opened.

On November 22, 1969, the Court in special session did vote to issue the school bonds demanded by Commissioner Warf. The bond issue was approved under T.C.A. 49-701 and T.C.A. 49-702; neither the county attorney nor Commissioner Warf ever advised the Court that the bonds could be issued under T.C.A. 49-201 or T.C.A. 5-1001 which sections provide for a public referendum. The Court was advised as to the provisions of the above code sections by an attorney retained by a citizens' group. Nevertheless, the Court authorized the bond issue as demanded by Commissioner Warf—without a referendum.

Complainants would show that the bussing of children over a county as large as Giles would entail long dangerous hours upon crowded highways or narrow hilly back roads; that time spent by most students would be much greater than would be spent in getting to schools in each child's community; that long and arduous twice-daily trips to a remote and distant school is a hardship, a hazard and unduly expensive.

Complainants would show that the advantages of a large centralized and impersonal school are far out weighed by the advantages of a local school which is a living part of the community shared in and supported by all members of the community in many diverse ways, and that parents have a

right to have a voice in the bringing up and education of their children and that children are not mere creatures of the State.

Complainants would show that there is much authority for their position. For example, President Nixon, in his Policy Statement on schools March 24, 1970 said:

> Whatever makes the schools more distant from the family undermines one of the important supports of learning.
>
> The school stands in a unique relationship to the community, to the family and to the individual student. It is a focal point of community life. It has a powerful impact on the future of all who attend. It is a place not only of learning but also of living — where a child's friendships center, where he learns to measure himself against others, to share, to compete, to co-operate and it is the one institution above all others with which the parent shares his child.
>
> An open society does not have to be homogeneous or even fully integrated. There is room within it for many communities."

Complainants would respectfully show to the Court that, under no specific authority, the Commissioner of Education has presumed to promulgate rules and regulations that have the force of law. Under no theory of the inherent power, that a department head may have to make intramural rules for his department, may he usurp the law making authority of the Legislature.

Complainants would show, assuming for the sake of argument that the Commissioner of Education did have the power to form rules and regulations, that standards applicable to all school systems on an equitable basis would be necessary. But, as it is, the Rules and Regulations of July 1969 contain blanket waiver provisions which allow the Commissioner of Education, at his unfettered whim, the power to make one set of requirements for one school system

and an entirely different set for another. These waiver provisions cannot be justified in the name of pragmatism or reasonable elasticity of power for the reason that the waiver power is assumed in only three areas of administration having to do with personnel and buildings. In the fields of transportation and the school lunch program, no possibility of relief, even by whim, is granted. The completeness of the unfettered power is made more apparent upon consideration of Section 21 of the 1969 Public School Laws of Tennessee which provides:

> "SECTION 21. BE IT FURTHER ENACTED, That the State Commissioner of Education is hereby authorized and empowered to withhold minimum foundation school program funds for current operation and maintenance for public schools, grades one through twelve, or capital outlay funds distributed under the provisions of this Act, or both, from any county, city, or special school district system which has within such school system a school which does not meet the requirements of the State Board of Education for an approved school."

The life and death power of the Commissioner over the schools depends on whether or not a school in the system meets the approval of the Commissioner or the "requirements" of the State Board; and the requirements can be "waived" up or down by the Commissioner.

The Commissioner may make the rules, and alter them at will and then decide whether or not they are being obeyed and then administer the money accordingly. He is at once, Legislature, Judge and Executive.

Complainants would show further that whatever power the Commissioner of Education may, or may not possess, the power was in the instant case, improperly used in Giles County.

The Commissioner, being the repository of funds allocable

to the counties, occupies a fiduciary capacity. In such capacity he is obligated to use candor in dealing with the counties. However in his official communication to the County Judge of Giles County of October 9, 1969 he stated the bare fact that "Chapter 7, Title 49 of T.C.A., as amended, the same being entitled *Bonds for School Purposes,* makes no provision whatsoever for a referendum". This is only half the truth. The whole truth is that whereas the Quarterly Court "may" under the statutes cited above, authorize the issuance of bonds by a simple majority vote of the magistrates, they certainly may also, under T.C.A. 49-201 paragraph 5, "—submit to the voters of the county, at any regular session, or any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith".

It is true that T.C.A. 49-701-2 has been interpreted as an exception or an available alternative to T.C.A. 49-201 but nowhere has T.C.A. 49-701-2 been interpreted as the *only* vehicle available to the court for the issuance of bonds.

The Commissioner's letter of October 9 also fails to mention T.C.A. 5-1001 which provides:

> 5-1001. POPULAR VOTE TO AUTHORIZE BONDS — EXCEPTIONS. - Any bonds authorized to be issued by any of the counties, upon the faith and credit of such county, for public purposes, shall only be upon an election to be first held by the qualified voters of such county and the assent of a majority of the votes cast in said election; provided, that nothing in this section shall be construed as applicable to renewal or refunding bonds; provided, further, that nothing in this section shall be construed as applicable to the issuance of bonds for the building of a courthouse in any county in which the courthouse has been destroyed. Nothing in this section shall interfere with or affect any present enabling

act for state and federal aid for the construction of state and federal roads.

Complainants would show further that the intent of the law generally (1) is to preserve the right of referendum to the voters. This is evidenced by T.C.A. 5-1107-8, 5-1024 and 49-201 and the intent of the Quarterly Court was plain in its resolution of *October 13, 1969* to utilize its powers under these statutes. The Attorney General's narrow interpretation of the situation on technical grounds is in error.

Complainant would show further that T.C.A. 49-215 provides inter alia:

> The County Board of Education shall have the power: (1) To make consolidation of two (2) or more schools whenever in its judgment the efficiency of said schools would be improved thereby.
>
> This power was in fact wrongfully and unconstitutionally usurped by the Commissioner of Education.

VII.

Complainants would show further that the Quarterly Court of Giles County has a duty to exercise its uncoerced discretion in determining legislative matters for the county and to represent the people thereof.

These duties in regard to education are specifically set out in T.C.A. 49-201:

> "49-201. DUTIES OF QUARTERLY COUNTY COURT. - The Duties of the quarterly county court shall be:
>
> (1) To elect members of the county board of education and to fill all vacancies on said board except in counties where the board is elected by the people; also to elect county superintendents in certain counties where this is required by law; and to fill a vacancy when it occurs in

(1)-Article I, Sec. I Const. of Tenn.

> the office of county superintendent, where they have elected same.
>
> (2) To consider, on the recommendation of the county board of education, school budgets for the county elementary and county high schools, and to provide necessary funds to enable said county board to meet all obligations under the adopted budgets.
>
> (3) To require the county board of education, through the county superintendent, to make a quarterly report of the receipts and expenditures of the public school funds, the needs of the county elementary and the county high schools, the progress made in their development and such other information as to the administration of the public schools as it may require.
>
> (4) To require its finance committee to examine the accounts of the county board of education quarterly, or at any other time it may appear that said county board is misusing any of the public school funds, or exceeding the budget adopted by said court; or it may appoint a competent auditor to make said examination, the cost of such examination to be paid out of county funds.
>
> (5) To submit to the voters of the county, at any regular session, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.
>
> (6) To levy such tax as may be necessary to pay interest on bonds and to provide a sinking fund to retire same at maturity.
>
> (7) To levy such taxes for county elementary and county high schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the quarterly county court.

(8) To levy sufficient taxes or provide funds by bond issues by the voters for the purchase of school grounds, the erection and repair of school buildings, and for equipping the same; provided, same shall have been provided for by the quarterly court, or that said court shall have approved the authorization of same by the county board of education.

(9) To provide sufficient funds to erect a suitable building and maintain at least one (1) first-class four (4) year high school according to the provisions of this title."

Commissioner Warf has thwarted the fundamental duty of the duly elected representatives of the people by unconstitutional and extra-legal procedures.

VIII.

The complainants respectfully request a declaration by this Honorable Court that the Public Education Act of 1969 is unconstitutional in that it grants "unfettered" and arbitrary powers to the Commissioner of Education in violation of the equal protection clause and the due process clause of the United States Constitution (Amendments V and XIV) and in violation of Article 1, Section 1, Article 2, Sections 1, 2, 28 and 29, and Article II, Section 8 of the Constitution of Tennessee.

IX.

PREMISES CONSIDERED, COMPLAINANTS PRAY:

1. That proper process issue and be served on the defendants requiring them to appear and answer this Bill, but not under oath, their oath being expressly waived.

2. That the Court herein determine the issues presented by this action under the Declaratory Judgment Act and that if so advised the Court declare the Public Education Act of 1969

unconstitutional in that powers therein are unconstitutionally delegated as set out in Section VII hereof.

3. That after a hearing the County Judge of Giles County and the County Court of Giles County and its members be enjoined from any and all acts in furtherance of the bond issue in question.

4. That after a hearing the Commissioner of Education be enjoined from continuing the exercise of unconstitutional powers or the unconstitutional and illegal exercise of any powers as complained of herein.

5. That the Quarterly Court be specifically advised that the procedures under T.C.A. 5-1107-8 are available to the Court and the people of Giles County, whereas in this situation, the intent and purpose of the voters is to question a bond issue.

6. That the complainants be awarded such other relief as may be meet and proper.

/s/ Jack Kershaw
Solicitor for Complainants

STATE OF TENNESSEE
COUNTY OF GILES

Alton White, Talmage Pierce, Billy Bassham, Carl A. Woodard, and James E. Thorne, first being duly sworn, make oath that they are the complainants in the foregoing bill, that

the statements contained therein are true to the best of their knowledge, information and belief.

/s/ Alton White

/s/ Talmage Pierce

/s/ Billy Bassham

/s/ Carl A. Woodard

/s/ James E. Thorne

Sworn to and subscribed before me this
15 day of June, 1970.

/s/ Charlie M. McKnight
NOTARY PUBLIC

My Commission Expires: April 15,
1973.

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

ALTON WHITE, et al

Complainants,

VS.

J. H. WARF, et al

Defendants,

Rule No: 93495

FILED
SEP 4 1970
MILDRED B. WHITE
DEPUTY C & M

AMENDED BILL
(Not Served & not Answered)

The complainant respectfully shows to the Court:

I.

That on the 6th day of June he filed his original bill for Declaratory Judgement in your Honors Court alleging among other things the unconstitutionality of Section 21 of the Education Act of 1969 (and because of its scope, the entire act so long as Section 21 remains unaltered), and the unconstitutional exercise of power by the Commissioner of Education in influencing and coercing the discretion of defendants Quarterly Court and the School Board of Giles County, (now made defendants by this amendment) which resulted in improperly motivated preliminary acts which are sought to be enjoined. In the Original Bill Complainant prayed that:

1. That proper process issue and be served on the defendants requiring them to appear and answer this Bill, but not under oath, their oath being expressly waived.

2. That the Court herein determine the issues presented by this action under the Declaratory Judgement Act of 1969

unconstitutional in that powers therein are unconstitutionally delegated as set out in Section VII hereof.

3. That after a hearing the County Judge of Giles County and the County Court of Giles County and its members be enjoined from any and all acts in furtherance of the bond issue in question.

4. That after a hearing the Commissioner of Education be enjoined from continuing the exercise of unconstitutional powers or the unconstitutional and illegal exercise of any powers as complained of herein.

5. That the Quarterly Court be specifically advised that the procedures under T.C.A. 5-1107-8 are available to the Court and the people of Giles County, where, as in this situation, the intent and purpose of the voters is to question a bond issue.

6. That the complainants be awarded such other relief as may be meet and proper.

II.

And now by leave of your Honor, complainants present this Amendment to the Bill and request that:

1. The members of the Board of Education of Giles County in their official capacity be named as additional parties defendant:

2. The members of the Board of Education of Tennessee in their official capacity be named as additional parties defendant:

3. At the end of the 1st paragraph of the Bill the following language consistent with the Bill be added:

> "Complainant's as taxpayers and landowners, state that they have special interest in this suit in that it involves the closing of valuable school buildings and the building of others and that the result will directly and positively affect their taxes and tax rates which may be

> well inequitably in varience from that of other taxpayers in other school districts in addition to affecting their constitutional rights."

> "Complainants as parents of children attending the public schools of Giles County have also a special interest in a most valuable property, their children, who are subject to imposition of danger, loss of time and threats to health and well being by the acts of the Court and the School Board which combine to close certain neighborhood schools and subject children to long and hazardous bus trips and the parents to additional expenses."

4. At the end of page 6 the following language be added consistent with the Bill:

> "Complainant states that records attached as exhibits and the minutes of the Court show that the Court never exercised its untrameled discretion in the matter of the bond issue, but that their policy was dicated by Defendant Warf and had been set and settled and passed a week or more before the attorney for the citizens group was allowed to appear before the Court for precisely ten minutes and not one second longer, and that directly and immediately thereafter with no questions, no discussion and no exercise of discretion the Court proceeded to other matters; no opinion on the matter was sought or given by the County Court attorney.

5. A phrase, "The 1st Amendment of The United States Constitution", which was omitted by inadvertance should be inserted immediately following "in violation of" in Section VII of the Bill.

6. A paragraph, "That the above Section 21 was re-enacted by the appropriation act of 1970 (chapter 489)" be inserted after the quotation of Section 21 in Section III of Bill.

7. A new Section, Section VIII A be added after Section VIII as follows:

"There is a real controversy between the parties in that the state defends and constitutionality of the Education Act of 1969 and its Section 21 imparticular and the complainants attack it; the Commissioner of Education defends his exercise of power and his manner in so doing, in withholding funds as constitutional and complainants contend to the contrary."

"Complainants aver that they have the right to file this Bill under the Declaratory Judgement Act of Tennessee interpreted as to its constitutionality and the constitutionality and propriety of the commissioners acts thereunder," Complainants also aver that they have the right to the Court's interpretation as to the application and availability of certain statutes of Tennessee (T.C.A. Sections 49-201, 490701, 49-702, 5-1001, 5-1024, and 5-1107) to the Court.

PREMISES CONSIDERED, COMPLAINANTS PRAY:

1. That proper process issue to new parties defendant and their oaths be expressly waived.

2. That all the defendants to this amended Bill be required to answer but not under oath.

3. That specifically the Constitutionality of Section 21 and the "Rules and Regulations" of the State Department of Education be construed.

4. That the acts of the Commissioner in re: Section 21 and the rules and regulations be construed.

5. That T.C.A. Sections 49-201, 5-1001, 5-1024, 5-1107, 49-701 and 49-702 of T.C.A. and their applications and availability to the Court be construed.

6. For general relief.

/s/ Jack Kershaw
Solicitor for Complainants

ALTON WHITE, ET AL.,
Appellants

VS

J. H. WARF, ET AL.,
Appellees

Davidson Equity

FILED
JAN 17 1972
RAMSEY LEATHERS
CLERK
SUPREME COURT

For Appellants:
Jack Kershaw
Nashville, Tennessee

For Appellees:
C. Hayes Cooney
Assistant Attorney General
Nashville, Tennessee

D. C. Lee
Pulaski, Tennessee

Joe W. Henry, Jr.
Pulaski, Tennessee

OPINION

The instant case is a suit for a declaratory judgment and injunctive relief which was commenced by appellants in the Chancery Court of Davidson County, Part I, pursuant to T.C.A. §23-1101, et seq. The trial court held that the demurrers of the appellees were well founded and dismissed the suit.

The appellants in this Court, complainants below, are: Alton White, Carl A. Woodard, Talmage Pierce, James E. Thorne, and Billy Bassham. The original bill sets forth that complainants are citizens, property owners, taxpayers, and parents of children attending the public schools of Giles County. The defendants to the suit are: J. H. Warf, Commissioner of Education of the State of Tennessee; David Pack, Attorney General and Reporter for the State of

Tennessee; Joe C. Carr, Secretary of State of Tennessee; Coleman G. Davis, County Judge of Giles County, Tennessee; and the members of the Giles County Quarterly Court. Defendants are sued in their official capacities.

Complainants aver that on January 9, 1969, Minor Hill High School in Giles County burned and was totally destroyed; that the School Board of Giles County conferred with defendant Warf about rebuilding the school; that Commissioner Warf refused to provide funds to rebuild Minor Hill School until all schools in Giles County met State standards; that Commissioner Warf suggested "that the best solution for Giles County was to build one consolidated high school"; that on July 8, 1969, the Giles County School Board decided to keep the remaining schools open and refused to petition the County Quarterly Court for funds to build a consolidated high school; that defendant Warf then withdrew State educational funds from Giles County, pursuant to Chapter 294, Section 21 of the Public Acts of 1969. Complainants further aver that on August 11, 1969, the County Court adopted a resolution whereby $2,900,000.00 would be appropriated for the purpose of building "one consolidated high school"; after this resolution was adopted defendant Warf then restored State educational funds to Giles County; that on October 13, 1969, the Giles County Quarterly Court deferred action on issuing bonds to finance the construction of the new high school and authorized a referendum for the purpose of determining whether or not Giles County should construct a new high school; that, thereupon, defendant Warf once again withheld State funds from Giles County; that on November 7, 1969, the public school system of Giles County ceased to operate because of lack of funds; that on November 22, 1969, the County Quarterly Court did vote to issue bonds to finance the construction of a new high school, pursuant to T.C.A. §49-701, 702; and that State educational funds were then released to Giles County and the public schools reopened.

Complainants allege that Section 21 of Chapter 294 of the Public Acts of 1969 is unconstitutional since it allows the Commissioner of Education to arbitrarily withhold educational funds from a school system which does not meet the requirements of the State Board of Education in violation of the equal protection and due process clause of the Federal Constitution; and that the County Quarterly Court improperly issued the school bonds; that while T.C.A. §§49-701, 702 allows the County Quarterly Court to issue school bonds without a referendum by the voters of the County, the Quarterly Court may issue bonds pursuant to T.C.A. §5-1001 and T.C.A. §49-201 which require that a referendum be held to authorize the issuance of bonds. Complainants pray that Chapter 294 of the Public Acts of 1969 be declared unconstitutional and that the County Judge and County Quarterly Court of Giles County be enjoined from any acts in furtherance of issuing the bonds.

Defendants Warf and Pack demur to the original bill on two grounds. They are: (1) that the bill fails to state or allege that the complainants have such special or real interest in the provisions of Chapter 294 of the Public Acts of 1969 as to entitle them to a declaratory judgment and (2) the bill shows on its face that there is no real or justiciable controversy presently existing between complainants and defendants Warf and Pack.

Coleman G. Davis, County Judge of Giles County, and the members of the Quarterly County Court of Giles County also filed a demurrer to the original bill. The grounds of the demurrer are: (1) that the original bill fails to allege that complainants have such special interest greater than any other member of the general public to question the validity of Chapter 294 of the Public Acts of 1969: (2) that the bill shows on its face that there is no real controversy between complainants and defendants; (3) that defendants are without authority to determine school policies or determine number, location, or kind of schools within Giles County; (4) that the

bill admits that the County Quarterly Court of Giles County has discretion in the method of financing appropriation for the public school system and has no duty to call a referendum regarding the issuance of school bonds; (5) that the Chancery Court is without jurisdiction to direct the discretionary affairs of the Quarterly County Court of Giles County; (6) that even if Chapter 294 of the Public Acts of 1969 is unconstitutional, then this would not void the issuance of the bonds by the County Court; and (7) the bill fails to state a cause of action against defendants.

After the demurrers of defendants were filed, complainants filed an amended bill. In the amended bill complainants allege that they have a special interest as taxpayers and landowners in that valuable school buildings will be closed and other new school buildings will be built; that this new construction "will directly and postively affect their taxes and tax rates."

Special Chancellor Lansden was of the opinion that the demurrers were well taken, and dismissed the suit against defendants. Complainants prayed and were granted an appeal to this court. The appeal was never perfected since complainants failed to file an appeal bond. Complainants' appeal was dismissed.

Thereafter, complainants petitioned this Court for writ of error. Chief Justice Dyer granted the writ pursuant to T.C.A. §27-605.

During oral argument before us there was an extended discussion with counsel for complainants as to whether or not complainants have standing to maintain the instant suit. In our view the question of standing to sue is determinative of the case at bar, and we are of the opinion that complainants do not have such special status or interest as to allow them to maintain the suit.

In order for a party to prosecute a suit as a *citizen, taxpayer,* and *property owner* to restrain acts by public

officials in excess of their authority or to challenge the constitutionality of a legislative enactment, then generally speaking it is necessary that the party allege some special interest in relation to the relief sought which is not common to the general public as a whole. The importance of an averment showing some special interest was succinctly stated in *Badgett v. Rogers* (1968) 222. Tenn. 374, 436 S.W.2d 292. We there said:

> "(2) As a general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character or kind from those sustained by the public at large.
>
> (3) An action by citizens and taxpayers of a municipality questioning the conduct of the municipality or its officers is ordinarily dependent upon averment of a special injury, status or relation affecting, individually, the citizen attempting to prosecute the action. Generally, the prime test of this inquiry as to special injury or interest is that it not be common to the body of citizens as a whole. In a proper case, absent such averment, it is the duty of the trial judge to dismiss the cause."

Neither the original nor the amended bill contains any averment showing that complainants have an interest different from that of the public generally in asserting the constitutional invalidity of Section 21, Chapter 294 of the Public Acts of 1969. This defect is fatal.

At this juncture, it should be pointed out that in their amended bill complainants did aver that they have a "special interest in this suit in that it involves the closing of valuable school buildings and the building of others and that the result will directly and positively affect their taxes and tax rates." This allegation of a special interest was obviously included to show the requisite standing to prosecute suit to enjoin the

County Judge of Giles County and the members of the County Quarterly Court from any acts in furtherance of the issuance of the school bonds.

It is true that taxpayers have the right to resort to a court of equity to enjoin county and municipal authorities from transcending their lawful powers or violating their legal obligations, if such conduct would impose an additional burden of taxation, since such burden upon taxpayers is not common to citizens who pay no taxes. *Reams v. Board of Mayor & Alderman of McMinnville* (1927) 155 Tenn. 222, 291 S.W. 1067. However, complainants do not aver any facts to bring themselves within this rule. There is no averment that the County Quarterly Court of Giles County exceeded its lawful authority in voting to issue the school bonds pursuant to T.C.A. §§49-701, 702. In fact, complainants admit that the bonds were validly issued, and they only assert that the County Quarterly Court could have issued the bonds pursuant to other statutes which require a referendum.

In order for a taxpayer to restrain county or municipal officials from transcending their lawful powers, there must be an allegation not only that the taxpayer has a special interest, but also that the county or municipal authorities are acting illegally. Both averments are essential. *Reams v. Board of Mayor & Aldermen of McMinnville*, supra. It is apparent beyond dispute that complainants fail to allege any illegal action on the part of the County Quarterly Court of Giles County.

It results that the action of the Special Chancellor, in sustaining the demurrers of defendants, is affirmed. The costs of this appeal are taxed to complainants.

/s/ Larry Creson

LARRY CRESON, Justice

Dyer, C.J.,
Chattin, Humphreys and
McCanless, JJ., concur

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

GERALD S. YOUNG,
TALMAGE PIERCE,
EDWARD WALL,
PAUL TOWNSEND,
JAMES E. THORNE,
CARL A. WOODARD,
LEO DAVIS,
PAUL MALONE,
HARVEY D. JOHNSON

No. A-1536

FILED
MAY 17, 1972
DORIS ANN WILLES
D.C. & M.

Plaintiffs

VS.

J. H. WARF, Former Commissioner of Education, E. C. Stimbert, Present Commissioner of Education of the State of Tennessee, DAVID PACK, Attorney General, and Reporter for the State of Tennessee, JOE C. CARR, Secretary of State, The State of Tennessee, THE GILES COUNTY QUARTERLY COURT, composed of HOMER D. BOGGS, CLARK WILKINSON, JOHN L. TUCKER, ROBERT L. BIRDSONG, TILLMAN DAWES, HORACE DURHAM, DICKSON MARKS, I. G. WILBURN, MARK DUNNAVANT, WILFRED HELTON, J. W. MOORE, J. D. WOODARD, BURROW McNEESE, ROBERT ROBINSON, FOSTER E. ARNOLD, BILL CHEATHAM, W. LAMBETH LESTER, GEORGE WORSHAM, JACK B. HENRY, TILLMAN CARVELL, W. T. EARHEART, and SAM WILSON, C. G. DAVIS, County Judge of Giles County, Tennessee; The Board of Education of Giles County, Tennessee composed of DR. H. G. LYNCH, LLOY HICKMAN, TOM GORDON, E. L. ANDERSON, SMITH HOWARD, EDWARD BURNS, R. L. TOWNSEND, J. MARLIN GOODMAN, Supt.; and the Board of Education of the State of Tennessee composed of GEORGE H. BARNES, T. M. DEVINE, KENNETH EZELL, JOHN K. FOLGER, DALE GLOVER, H. LYNN GREER, JR., EDWARD L. JENNINGS, JAMES H. JONES, JR., EDWIN H. KENNEDY, MRS. C. ELENTZ STEVENS, HUGH T. McDADE, F. THORNTON STRANG, J. FRANK TAYLOR, GOVERNOR WINFIELD DUNN, and J. C. BRADFORD AND COMPANY, BROKERS.

Defendants

COMPLAINT

The Plaintiffs respectfully show to the Court:

I.

That the plaintiffs are citizens, property owners, or freeholders, taxpayers and parents of children attending the public schools of Giles County, Tennessee. They bring this suit for themselves and others similarly situated as typical representatives of a class that have common interests with questions of fact and law common to the class and are so numerous as to make it impracticable to bring them before this Court individually. Plaintiffs say that they will fairly and adequately protect the interests of the class. As some indication of the concern among residents of Giles County of the matters herein, a list of Petitioners to the Court and their Petition is attached hereto as Exhibit "A" but need not be copied for issuance of process.

Plaintiffs as taxpayers and landowners, state that they have special interest in this suit in that it involves the closing of valuable school buildings and the buildings of others and that the result will directly and adversely affect their tax rates and tax liability without similarly affecting other taxpayers and particularly without similarly affecting persons who do not own property within the district.

Plaintiffs as parents of children attending the public schools of Giles County have also a special interest in a most valuable property, their children, who are subject to imposition of danger, loss of time and threats to health and well being by the acts of the Court and the School Board which combine to close certain neighborhood schools and subject children to long and hazardous bus trips and the parents to additional expenses. These plaintiffs as parents aver that they have an interest different from that of the public generally in that the public generally are not all parents, nor parents of school children.

II.

The defendant, J. H. Warf was Commissioner of Education of the State of Tennessee at the time of the illegal acts complained of and as such was the administrator of funds of the Department of Education under statutory provisions here sought to be construed. The Statutory Regulatory authority under which former Commissioner Warf worked is still in force, though as alleged by plaintiffs herein is still unconstitutional. Therefore, E. C. Stimbert, present Commissioner of Education is also named as defendant since the "unfettered power" exercised by Commissioner Warf is now exercised by Commissioner Stimbert.

The defendant, David Pack, is the Attorney General and Reporter for the State of Tennessee, and is made a party defendant to the action under the provisions of T.C.A. Section 23-1107.

The defendant, Joe C. Carr, is Secretary of State for the State of Tennessee and is the agent for service of process upon the State of Tennessee and its officials.

The defendant, C. G. Davis, County Judge of Giles County, Tennessee and the members of the Court are made defendants in their capacities as the legislative body appropriating certain funds for the public school system of Giles County, Tennessee.

The defendants, Homer D. Boggs, Clark Wilkinson, John L. Tucker, Robert L. Birdsong, Tillman Dawes, Horace Durham, Dickson Marks, I. G. Wilburn, Mark Dunnavant, Winfred Helton, J. W. Moore, J. D. Woodard, Burrow McNeese, Robert Robinson, Foster W. Arnold, Bill Cheatham, W. Lambeth Lester, George Worsham, Jack B. Henry, Tillman Carvell, W. T. Earhart, and Sam Wilson are made defendants in their capacity as members of the Quarterly Court of Giles County, Tennessee.

The defendants, Dr. H. G. Lynch, Lloy Hickman, Tom Gordon, E. L. Anderson, Smith Howard, Edward Burns, R.

L. Townsend, are made defendants in their capacity as members of the Board of Education for Giles County.

J. C. Bradford Company Brokers is made a defendant as the fiscal agent of Giles County and agent for floating an illegal bond issue.

The defendant, J. Marlin Goodman is made a defendant in his capacity as administrator of the Giles County School System.

The defendants, George H. Barnes, T. M. Devine, Kenneth Ezell, John K. Folger, Dale Glover, H. Lynn Greer, Jr., Edward L. Jennings, James H. Jones, Jr., Edwin H. Kennedy, Mrs. C. Elentz Stevens, Hugh T. McDade, F. Thornton Strang, J. Frank Taylor, Governor Winfield Dunn are made defendants in their capacity as members of the Tennessee State Board of Education.

III.

That the 86th General Assembly of the State of Tennessee in 1969 enacted the 1969 Public School Laws in Tennessee, Chapter 294, Section 21 of which provides:

> SECTION 21. BE IT FURTHER ENACTED, That the State Commissioner of Education is hereby authorized and empowered to withhold minimum foundation school program funds for current operation and maintenance for public schools, graded one through twelve, or capital outlay funds distributed under the provisions of this Act, or both, from any county, city, or special school district system which has within such school system a school which does not meet the requirements of the State Board of Education for an approved school.

That the above Section 21 has been re-enacted by each successive Tennessee Legislature.

That on June 18, 1969, the Tennessee State Board of

Education and J. H. Warf, Commissioner, adopted "Rules, Regulations, and Minimum Standard" and published same in pamphlet form. There is no authority cited under which statute these "Rules and Regulations" are promulgated nor is there any specific authority for same recorded in Tennessee Code Annotated. Commissioner E. C. Stimbert has re-adopted these Rules and Regulations in all relevant aspects.

The Rules and Regulations are attached and made a part hereof but need not be copied for issuance of process. (Exhibit "B"). They set out stringent and detailed requirements under the general headings of:

I. Administrative Rules and Regulations
II. Minimum Requirements for the Approval of Public Schools
III. Minimum Standards for School Attendance Centers, School Sites, Construction of School Buildings, Major Repairs of School Buildings of a Capital Outlay Nature, and Equipment of School Buildings.
IV. Pupil Transportation and Minimum Standards for School Buses
V. The National School Lunch, Special Milk, School Breakfast and Other Food Service Programs in the Public Schools of Tennessee-Grades K through 12.

At the end of Part I, "Administrative Rules and Regulations" on page 29, after all the rules in that section have been set out, a general "waiver" is provided as follows:

"The State Commissioner of Education is authorized to grant waivers of any of these rules and regulations"

On page 58, a similar blanket power of waiver is granted in regard to Section II, "Minimum Requirements for the Approval of Public Schools".

On page 69 at the end of Section III (the section on school buildings) a somewhat more restrictive waiver power is granted in that there the commissioner is required to use his discretion before acting. The precise language is:

"The State Commissioner of Education is hereby authorized to grant waivers of any of these standards if in his discretion it seems advisable because of factors which might improve the location or facilities for the total school attendance centers."

For Sections IV and V no power of waiver is granted or assumed.

IV.

The sequence of events culminating in this action are as follows:

On January 9, 1969 Minor Hill High School burned; the principal structure was totally destroyed. The student body and the faculty were intact but nevertheless the Commissioner of Education declared the school to be not in existence, dissolved and abolished. Mere physical destruction of walls and roof prompted a decision restructuring the educational fabric and the nature of the community.

The School Board journeyed to Nashville to confer with the Commissioner.

On May 26, 1969, Commissioner Warf sent a letter to the Superintendent of Giles County Schools in which he advised that he could not consider rebuilding Minor Hill until all schools in the county were brought up to state standards and that the best solution for Giles County was to build one consolidated high school. Commissioner Warf concluded his advice with the following:

"If your Board of Education cannot or will not provide my office with an acceptable plan for improving the schools, supported by necessary funds, then my office will have to

take whatever action it deems appropriate to insure the children in Giles County an equitable educational program."

A copy of this letter is attached and made a part hereof, but need not be copied for issuance of process. (Exhibit "C")

Plaintiffs aver that this letter constitutes coercion and is an illegal threat to the school board and to the superintendent.

In the week of July 8th the School Board proposed that three high schools be closed and that five should remain open. At this point Commissioner Warf ordered state funds withheld from Giles County.

Plaintiffs aver that this act was illegal and unconstitutional. Subsequently the Giles County Board of Education resolved to petition the Quarterly Court in a called session for August 11, 1969, to appropriate $2,900,000.00, $2,500,000.00 of which was to be used to build one consolidated high school in conformance with Commissioner Warf's demands. The School Board pointed out in its resolution that it had never wanted one consolidated high school and was requesting money for same under pressure and threats of Commissioner Warf. A copy of the resolution is attached but need not be copied for issuance of process. (Exhibit "D"). Plaintiffs aver that this petition plainly indicates that the School Board illegally submitted to the illegal demands of the Commissioner of Education.

The County Court in its August 11th meeting considered the resolution and first voted to table and then after some discussion (including long distance phone calls to Commissioner Warf in which he threatened cut off of funds unless the magistrates acceded to his demands) voted to adopt the resolution. As a result, Commissioner Warf reinstated state funds for Giles County. A copy of the proceedings is attached but need not be copied for issuance of process. (Exhibit "E"). Plaintiffs aver that these proceedings constitute an illegal submission by the Quarterly

Court to the illegal demands of the Commissioner of Education.

In September, citizens circulated a petition requesting the Quarterly Court to conduct a referendum on the general question of funding consolidated schools. (See Exhibit "A"-1).

On October 9th, Commissioner Warf wrote a letter to the Honorable Coleman G. Davis, County Judge of Giles County in which he stated that Chapter 7 of Title 49 T.C.A. makes no provisions for a referendum. He said nothing whatever concerning T.C.A. Section 49-201 or T.C.A. 5-1001 which do provide for a referendum on bond issues. The Commissioner of Education as Trustee of state funds acts in a fiduciary capacity and has a duty to reveal the whole truth. Plaintiffs aver that this letter does not tell the whole truth and constitutes illegal deceit of the Quarterly Court. Plaintiffs aver further that the Quarterly Court as fiduciary agents of the people of Giles County also had a duty to consider *all* alternatives. Failure to do so is culpable negligence, a defalcation of duty, and illegal.

Commissioner Warf again threatened to cut off funds if the Quarterly Court did not perform as he directed. A copy of his letter is attached but need not be copied for issuance of process. (Exhibit "F"). Plaintiffs aver that this letter repeats the offense complained of in regard to the first letter herein.

The Quarterly Court met on October 13th and resolved to defer action on the bond issue and to authorize a referendum "as to whether or not the recommendations of the School Board (for one consolidated high school) to accepted by the court".

Section I of the resolution read: "That for the purpose of providing the necessary funds to meet the proposal as recommended by the Giles County Board of Education to finance the construction of a new Senior High School at Pulaski, Tennessee, a new Junior High School at Minor Hill,

Tennessee, and improvements to other schools throughout the County, that there by issued the negotiable interest bearing bond anticipation notes of Giles County, Tennessee, in a total principal amount not to exceed $2,900,000.00. That said notes shall be designated "School Bond Anticipation Notes" and shall be numbered serially beginning with the number 1. Each of said notes shall be dated as of the date of issuance thereof, shall mature not later than two (2) years thereafter and shall be of such denominations as may be agreed upon by the County Judge and Trustee and the purchaser of said notes."

A copy of the resolution as passed by the Court is attached, but need not be copied for issuance of process. (Col. Ex. "G")

A copy of the initiating resolution which led to the above resolution as passed, is attached hereto but need not be copied for issuance of process. (Exhibit "H").

A copy of a petition submitted to the court on this subject and signed by a number of citizens is likewise attached but need not be copied for issuance of process. (Exhibit "I").

Plaintiffs aver the first reaction of the Court was to honor the petition of the people but finally, through a series of manipulations not revealed to plaintiffs, an opinion was secured from the Attorney General of Tennessee which held that the referendum as presented was of no force and effect and the Court refused to conduct any referendum. (A copy of the opinion is attached but need not be copied for issuance of process and is marked Exhibit "J"). Plaintiffs assert that the referendum presented to the Attorney General was not the referendum requested by the people.

Plaintiffs aver that Exhibits "I" and "H" clearly reveal that the Quarterly Court did not respond to the petition of the people which requested a valid referendum. The Quarterly Court did thereby illegally deprive the people of Giles County their constitutional right to redress of

grievances by petition as guaranteed by the First Amendment of the United States Constitution. Plaintiffs aver further that the Quarterly Court deliberately ignored a valid petition of the people and that the issuance of bonds by the Court without responding to said petition is a fraudulent act; the issuance of bonds under these circumstances is illegal and a fraud upon the people of Giles County and upon the prospective purchasers of the bonds.

The last sentence of T.C.A. 5-1024 and the second paragraph of T.C.A. 5-1107 is sufficient authority for the magistrates to hold a referendum had they desired to hold one, and reads as follows:

"5-1024. Bonds and Notes — *When Election Required.* — notwithstanding any provisions of this to the contrary the governing body may call an election as provided herein for the purpose of ascertaining the will of the qualified electors with respect to the issuance of the bonds." (See also T.C.A. 5-1107 for similar language; see also paragraph 5 of T.C.A. 49-201).

There was no referendum but also there was no bond issue and Commissioner Warf proceeded to withhold school funds from Giles County Schools. As a result of Commissioner Warf's withholding order, the Giles County Board of Education on October 22, 1969, closed the school system of Giles County for lack of funds.

On November 7th Quarterly Court was again called in special session and again refused to authorize a bond issue.

Thereupon severe and various pressures all illegal were brought upon the members of the court and at an informal meeting on November 11th, fourteen magistrates signed a pledge to vote for the bond issue for a consolidated high school.

Upon the basis of this pledge Commissioner Warf then released the school funds for Giles County and the schools re-opened.

Plaintiffs aver that this "pledge" was illegally secured and denied to the magistrates their free discretion in casting their votes.

On November 22, 1969, the Court in special session did vote to issue the school bonds demanded by Commissioner Warf. The bond issue was approved under T.C.A. 49-701 and T.C.A. 49-702; neither the county attorney nor Commissioner Warf ever advised the Court that the bonds could be issued under T.C.A. 49-201 or T.C.A. 5-1001 which sections provide for a public referendum. The court was advised as to the provisions of the above code sections by an attorney retained by a citizens' group. Nevertheless, the Court authorized the bond issue as demanded by Commissioner Warf - - - without a referendum.

Plaintiff states that records attached as exhibits and the minutes of the Court show that the Court never exercised its untrameled discretion in the matter of the bond issue, but that their policy was dictated by Defendant Warf and had been set and settled and passed a week or more before the attorney for the citizens group was allowed to appear before the court for precisely ten minutes and not one second longer, and that directly and immediately thereafter with no questions, no discussion and no exercise of discretion the Court proceeded to other matters; no opinion on the matter was sought or given by the County Court attorney.

V.

Plaintiffs would show that the busing of children over a county as large as Giles would entail long dangerous hours upon crowded highways or on narrow hilly back roads; that time spent by most students on buses would be much greater than would be spent in getting to schools in each child's community; that long and arduous twice-daily trips to a remote and distant school is a hardship, a hazard and unduly expensive.

Plaintiffs would show that the advantages of a large

centralized and impersonal school are far out-weighed by the advantages of a local school which is a living part of the community shared in and supported by all members of the community in many diverse ways, and that parents have a right to have a voice in the bringing up and education of their children and that children are not mere creatures of the State.

Plaintiffs would show that there is much authority for their position. For example, President Nixon, in his Policy Statement on schools March 24, 1970 said:

> "Whatever makes the schools more distant from the family undermines one of the important supports of learning.
>
> The school stands in a unique relationship to the community, to the family and to the individual student. It is a focal point of community life. It has a powerful impact on the future of all who attend. It is a place not only of learning but also of living - where a child's friendships center, where he learns to measure himself against others, to share, to compete, to co-operate and it is the one institution above all others with which the parents shares his child.
>
> An open society does not have to be homogeneous or even fully integrated. There is room within it for many communities."

VI.

Plaintiffs would respectfully show to the Court that, under no specific authority, the Commissioner of Education has presumed to promulgate rules and regulations that have the force of law. Under no theory of the inherent power, that a department head may have to make intramural rules for his department, may he usurp the law-making authority of the Legislature.

Plaintiffs would show, assuming for the sake of argument

that the Commissioner of Education did have the power to form rules and regulations, that standards applicable to all school systems on an equitable basis would be necessary. But, as it is, the rules and regulations of July 1969 and since re-adopted, and now current, contain blanket waiver provisions which allow the Commissioner of Education, at his unfettered whim, the power to make one set of requirements for one school system and an entirely different set for another. These waiver provisions cannot be justified in the name of pragmatism or reasonable elasticity of power for the reason that the waiver power is assumed in only three areas of administration having to do with personnel and buildings. In the fields of transportation and the school lunch program, no possibility of relief, even by whim, is granted. The completeness of the unfettered power is made more apparent upon consideration of Section 21 of the 1969 Public School Laws of Tennessee which provides:

> "SECTION 21. BE IT FURTHER ENACTED, That the State Commissioner of Education is hereby authorized and empowered to withhold minimum foundation school program funds for current operation and maintenance for public schools, grades one through twelve, or capital outlay funds distributed under the provisions of this Act, or both, from any county, city, or special school district system which has within such school system a school which does not meet the requirements of the State Board of Education for an approved school." (emphasis supplied)

The life and death power of the Commissioner over the schools depends on whether or not a school in the system meets the approval of the Commissioner or the "requirements" of the State Board; and the requirements can be "waived" up or down by the Commissioner.

The Commissioner may make the rules, and alter them at will and then decide whether or not they are being obeyed and then administer the money accordingly. He is at once,

Legislature, Judge and Executive.

Plaintiffs would show further that whatever power the Commissioner of Education may, or may not possess, the power was in the instant case, improperly used in Giles County.

The Commissioner, being the repository of funds allocable to the counties, occupies a fiduciary capacity. In such capacity he is obligated to use candor in dealing with the counties. However in his official communication to the County Judge of Giles County of October 9, 1969 he stated the bare fact that "Chapter 7, Title 49 of T.C.A., as amended, the same being entitled *Bonds for School Purposes*, makes no provision whatsoever for a referendum". This is only half the truth. The whole truth is that whereas the Quarterly Court "may" under the statutes cited above, authorize the issuance of bonds by a simple majority vote of the magistrates, they certainly may also, under T.C.A. 49-201 paragraph 5, "—submit to the voters of the county, at any regular session, or any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith".

It is true that T.C.A. 49-701-2 has been interpreted as an exception or an available alternative to T.C.A. 49-201 but nowhere has T.C.A. 49-701-2 been interpreted as the *only* vehicle available to the Court for the issuance of bonds.

The Commissioner's letter of October 9 also fails to mention T.C.A. 5-1001 which provides:

> 5-1001 POPULAR VOTE TO AUTHORIZE BONDS — EXCEPTIONS. — Any bonds authorized to be issued by any of the counties, upon the faith and credit of such county, for public purposes, shall only be upon an election to be first held by the qualified voters of such county and

> the assent of a majority of the votes cast in said election; provided, that nothing in this section shall be construed as applicable to renewal or refunding bonds; provided, further, that nothing in this section shall be construed as applicable to the issuance of bonds for the building of a courthouse in any county in which the courthouse has been destroyed. Nothing in this section shall interfere with or affect any present enabling act for state and federal aid for the construction of state and federal roads.

Plaintiffs would show further that the intent of the law generally (1) is to preserve the right of referendum to the voters. This is evidenced by T.C.A. 5-1107-8, 5-1024 and 49-201; and the intent of the Quarterly Court was plain in its resolution of October 13, 1969, to utilize its powers under these statutes. The Attorney General's narrow interpretation of the situation on technical grounds is in error.

Plaintiff would show further that T.C.A. 49-215 provides inter alia:

> The County Board of Education shall have the power: (1) To make consolidation of two (2) or more schools whenever in its judgment the efficiency of said schools would be improved thereby.

This power was in fact wrongfully and unconstitutionally usurped by the Commissioner of Education.

VII.

Plaintiffs would further show that the Quarterly Court of Giles County has a duty to exercise its *uncoerced* discretion in determining legislative matters for the county and to represent the people thereof.

These duties in regard to education are specifically set out in T.C.A. 49-201:

"49-201. DUTIES OF QUARTERLY COUNTY

(1)Article I Sec. 1 Const. of Tenn.

COURT — The *Duties* of the Quarterly County Court shall be:

(1) To elect members of the county board of education and to fill all vacancies on said board except in counties where the board is elected by the people; also to elect county superintendents in certain counties where this is required by law; and to fill a vacancy when it occurs in the office of county superintendent, where they have elected same.

(2) To consider, on the recommendation of the county board of education, school budgets for the county elementary and county high schools, and to provide necessary funds to enable said county board to meet all obligations under the adopted budgets.

(3) To require the county board of education, through the county superintendent, to make a quarterly report of the receipts and expenditures of the public school funds, the needs of the county elementary and the county high schools, the progress made in their development and such other information as to the administration of the public schools as it may require.

(4) To require its finance committee to examine the accounts of the county board of education quarterly, or at any other time it may appear that said county board is misusing any of the public school funds, or exceeding the budget adopted by said court; or it may appoint a competent auditor to make said examination, the cost of such examination to be paid out of county funds.

(5) To submit to the voters of the county, at any regular session, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.

(6) To levy such tax as may be necessary to pay interest

on bonds and to provide a sinking fund to retire same at maturity.

(7) To levy such taxes for county elementary and county high schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the Quarterly County Court.

(8) To levy sufficient taxes or provide funds by bond issues by the voters for the purchase of school grounds, the erection and repair of school buildings, and for equipping the same; provided, same shall have been provided for by the Quarterly Court, or that said court shall have approved the authorization of same by the county board of education.

(9) To provide sufficient funds to erect a suitable building and maintain at least one (1) first-class four (4) year high school according to the provisions of this title."

Commissioner Warf has thwarted the fundamental duty of the duly elected representatives of the people, by unconstitutional and extra-legal procedures.

VIII.

The plaintiffs respectfully request a declaration by this Honorable Court that the Public Education Act of 1969 is unconstitutional in that it grants "unfettered" and arbitrary powers to the Commissioner of Education in violation of the First Amendment of the United States Constitution equal protection clause and the due process clause of the United States Constitution (Amendments V and XIV) and in violation of Article I, Section 1, Article 2, Sections 1, 2, and 28, and Article II, Section 8 of the Constitution of Tennessee.

IX

There is a real controversy between the parties in that the State defends the constitutionality of the Education Act of 1969 and its Section 21 inparticular and the complainants

attack it; the Commissioner of Education defends his exercise of power, and his manner in so doing, in withholding funds as constitutional and plaintiffs contend to the contrary.

Plaintiffs aver that they have the right to file this Bill under the Declaratory Judgement Act of Tennessee to have said Section 21 interpreted as to its constitutionality and the constitutionality and propriety of the commissioner's acts thereunder, Plaintiffs also aver that they have the right to the Court's interpretation as to the application and availability of certain statutes of Tennessee (T.C.A. Sections 49-201, 490701, 49-702, 5-1001, 5-1024, and 5-1107) to the County Court.

X.

PREMISES CONSIDERED, COMPLAINANTS PRAY:

1. That proper process issue and be served on the defendants requiring them to appear and answer this Bill, but not under oath, their oath being expressly waived.

2. That this action be maintained as a class action.

3. That the Court herein determine the issues presented by this action under the Declaratory Judgement Act and that the Court declare those portions of the Public Education Act of 1969 and the Rules and Regulations deriving therefrom which grant undelegable and unfettered powers, to be unconstitutional.

4. That after a hearing the County Judge of Giles County and the County Court of Giles County and its members be enjoined from any and all acts in furtherance of the bond issue in question.

5. That after a hearing the Commissioner of Education be enjoined from continuing the exercise of unconstitutional powers or the unconstitutional and illegal exercise of any powers as complained of herein.

6. That the Quarterly Court be enjoined from denying to

the people of Giles County a referendum on the bond issue in question.

7. That the plaintiffs be awarded such other relief as may be meet and proper.

/s/ Jack Kershaw

Solicitor for Plaintiffs
Jack Kershaw
B-3 Stahlman Building
Nashville, Tennessee 37201

IN PART II OF THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

GERALD S. YOUNG, ET AL

vs.

J. H. WARF, ET AL

No. A-1536
FILED
JULY 20, 1972
EMILY LORD
D.C. & M.

AMENDED COMPLAINT

By leave of the Court, Plaintiffs amend their complaint in this cause as follows:

(1) Strike the last paragraph at the bottom of page 7 of the complaint and substitute the following which is identical to the original except for the underlined phrase herein:

The last sentence of T.C.A. 5-1024 and the second paragraph of T.C.A. 5-1107 is sufficient authority for the Magistrates to hold a referendum had they *not been illegally deprived of the exercise of their discretion by the Commissioner of Education,* and reads as follows:

(2) Add at the bottom of page 8 the following sentence:

Plaintiffs aver that for the reasons above stated, the

Court's approval of the Bond issue was illegal.

(3) Add at the end of Section VIII, page 13, the following phrase:

And that said Public Education Act violates the rights of parents who are deprived of the services of their children and places the children in an unnecessarily, unsafe and unhealthful position at great cost and anguish to the parents.

Respectfully submitted,

/s/ Jack Kershaw

Jack Kershaw, Solicitor for Plaintiffs

I certify that I have mailed copies to the State Attorney General and to County Attorney for Giles County, representing the Defendants in this case.

/s/ Jack Kershaw

Jack Kershaw

GERALD S. YOUNG, ET AL,

Plaintiffs-Appellants,

VS.

J. H. WARF, ET AL,

Defendants-Appellees.

FILED
APR 2 1973
RAMSEY LEATHERS
CLERK
SUPREME COURT

DAVIDSON EQUITY
NO. A-1536
HONORABLE FRANK F. DROWOTA, III,
CHANCELLOR.

For Plaintiffs-Appellants:	*For Defendants-Appellees:*
Honorable Jack Kershaw, Nashville, Tennessee.	Honorable David M. Pack, State Attorney General, Honorable Henry W. Haile, Assistant Attorney General, Nashville, Tennessee. Honorable D. C. Lee, County Attorney, Pulaski, Tennessee.

PER CURIAM MEMORANDUM

Complainants are parents and taxpayers of Giles County, seeking to block the construction of a consolidated high school in Giles County on the grounds that the Board of Education and the Giles County Quarterly Court were coerced into ordering the construction of the high school by defendant Warf, formerly the State Commissioner of Education, who they claim was acting under an unconstitutional law, Chapter 294 of the Public Education Act of 1969. The prayer of the bill is for a declaratory judgment that the Public Education Act of 1969 and the rules and regulations promulgated pursuant to the act are unconstitutional; that the Giles County Quarterly Court be enjoined from issuing the school bonds; that the Giles County Court be forced to call a referendum on the school bond question; and that the Commissioner of Education of the State of Tennessee be enjoined from exercising any powers derived from the Public Education Act of 1969. The Chancellor dismissed the suit on the ground that the parties were without standing to bring it. On appeal we have the contention that the Chancellor erred, and the further contention, the case being before the Court on appeal from a chancery decree, that the case of Alton White, et al v. Warf, et al, Docket No. 93495, Part I of the Chancery Court of Davidson County, Tennessee, is res adjudicate of this case.

Memorandum

On the basis of the record, and opinion of this Court in Alton White, et al v. Warf, et al, decided September 17, 1970, Docket No. 93495, Part I of the Chancery Court of Davidson County, Tennessee, opinion of this Court filed the 17th day of January, 1972, we hold that that case is res adjudicate of this case. Although there are *some new parties* suing in different capacities, and *new conclusory allegations of illegality*, these new parties, suing in their different capacities, and the new *conclusory allegations of illegality*, do not alter the case. The legal issues existing between the primary, interested parties are identical. Since these were *settled* by Alton White, et al v. Warf, et al, supra, that case is res adjudicate of this one.

The real purpose of the litigation is to prevent the construction of a consolidated high school in Giles County, contrary to the opinion of this Court in *White* that it can be built legally. We point out that although the courts of this state are open for the redress of wrongs, they cannot be used oppressively to gain the end the litigants and counsel have in mind, contrary to the judgments of the courts, and if the courts are so used they are not defenseless.

All of the determinative issues having been settled in Alton White, et al v. Warf, et al, supra, and the only possible purpose of the present suit being to delay the construction of the consolidated high school, contrary to the opinion of this Court, it is oppressive, and the Court will not welcome another like it.

The case is dismissed and the complainants and their sureties taxed with the costs.

PER CURIAM.

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

No. A-4207

EDWARD MITCHELL, HOWARD N. SHEPHARD, CALVIN T. REDDEN, JAMES T. OAKES,

Plaintiffs

VS.

BENJAMIN E. CARMICHAEL, Commissioner of Education of the State of Tennessee; MILTON P. RICE, Acting Attorney General and Reporter for the State of Tennessee; THE LINCOLN COUNTY QUARTERLY COURT, composed of LYLE M. FRANKLIN, W. F. PHILPOT, JOE D. TAFT, FRANK E. GRAHAM, HOWARD CAPSHAW, HOWARD MONKS, V.H. BARNES, BILLY PARKER, PAUL BARHAM, CECIL ELLIS, PANGLE STEWART, WM. R. CARTER, FRED YOUNG, J.T. WYATT, WM. S. JAKOVINA, HERMAN MONTGOMERY, L.C. CURTIS, JOHNNY STEVENSON, H. PARSONS, JR., FREEMAN TOWRY, DR, T.H. BULLINGTON, KNOX STEWART, CECIL COOKE, CLYDE FORRESTER, ROY SWEENEY, CON. S. MASSEY, E.C. COLLINS, THOS. E. HUDSON, MELVIN HOWELL, J.T. WALKER, LEONARD MANSFIELD and EARL VANN; TAYLOR CRAWFORD, County Judge of Lincoln County, Tennessee; the Board of Education of Lincoln County, Tennessee, composed of ERNEST PENDERGRASS, BRIMAGE L. SMITH, WM. T. MEDLEY, JAS. W. SMITH, R. E. BURROUGHS, C.H. HARDY, TULLY BUCHANON, WM. D. JONES and JOHN T. TOWRY; RICHARD WAGGONER, Administrator of the Lincoln County School System; the Board of Education of the State of Tennessee composed of NOBEL C. CAUDILL, T.M. DIVINE, JOHN K. FOLGER, THOMAS E. GERAGHTY H. LYNN GREER, JR., JAMES W. HAWKINS, EDWARD L. JENNINGS, HUGH T. MCDADE ANDREW J. PAYNE, JR., MRS. C. LENTZ STEVENS, F. THORNTON STRANG, MS. DORIS B. TANNER, BENJAMIN E. CARMICHAEL, STEPHEN DENNIS, GEORGE H. BARNES, KENNETH EZELL, DALE GLOVER, JAMES H. JONES, JR., EDWIN H. KENNEDY, FRANK TAYLOR and GOVERNOR WINFIELD DUNN, and CHAPMAN and CUTLER BROKERS.

COMPLAINT

The Plaintiffs respectfully show to the Court:

I.

That the Plaintiffs are citizens, property owners, or taxpayers, and parents of children attending the public schools of Lincoln County, Tennessee. They bring this suit for themselves, and others similarly situated, as typical representatives of a class that have common interests with questions of fact and law common to the class, and are so numerous as to make it impracticable to bring them before this Court individually. Plaintiffs say that they will fairly and adequately protect the interests of the class. As some indication of the concern among residents of Lincoln County of the matters herein, Plaintiffs aver that some five thousand (5,000) citizens have signed and presented petitions to the County Court of Lincoln County and the petitions are now held by that body. Petitioners seek the same relief as Plaintiffs herein.

Plaintiffs, as *taxpayers* and *landowners*, state that they have special interest in this suit in that it involves the closing of valuable school buildings, and the building of others and that the result will directly and adversely affect their tax rates, and tax liability, without similarly affecting other taxpayers, and particularly without similarly affecting persons who do not own property within the district.

Plaintiffs as *parents* of children attending the public schools of Lincoln County have also a special interest in a most valuable interest, their children, who are subject to imposition of danger, loss of time, and threats to health and well-being, by the acts of the court and the School Board which plaintiffs would show were illegally instituted by the Commissioner of Education which combine to close certain neighborhood schools, and subject children to long and hazardous bus trips, and the parents to additional expenses. These plaintiffs as parents aver that they have an interest

different from that of the public generally in that the public generally are not all parents, nor parents of school children.

II.

The defendant, Benjamin E. Carmichael is Commissioner of Education of Tennessee and is made a defendant herein his official capacity.

The defendant, Milton P. Rice, Attorney General and Reporter for the State of Tennessee is made a party defendant here, pursuant to T.C. A. Section 23-1107.

The defendant, Taylor Crawford, County Judge of Lincoln County, Tennessee, and the members of the Court are made defendants in their capacities as members of the Legislative body appropriating certain funds for the public school system of Lincoln County, Tennessee.

The named members of the School Board of Lincoln County are named as defendants in their official capacities as members of that body.

The Chapman and Cutler Company, Brokers, is named as a defendant as the fiscal agent of Lincoln County and agent for floating a proposed bond issue, the legality of which is questioned herein.

The defendant, Richard Waggoner is made a defendant as Administrator of the Lincoln County School System.

The defendants, George H. Barnes, T. M. Devine, Kenneth Ezell, John K. Folger, Dale Glover, H. Lynn Greer, Jr., Edward L. Jennings, James H. Jones, Jr., Edwin H. Kennedy, Mrs. C. Elentz Stevens, Hugh T. McDade, F. Thornton Strang, J. Frank Taylor and Governor Winfield Dunn are made defendants in their capacities as members of the Tennessee State Board of Education.

III.

This action is brought under authority of T.C.A. 23-1101-2-3 et seq and Rule 57 of the Tennessee Rules of Court.

Further, Plaintiffs assert, under authority of Rule 23 supra, their fitness to bring this suit as a class, since they fill all requirements of Rule 23-01-02.

IV.

1) A brief history of events culminating in this suit are that on August 10, 1973, the Commissioner of Education of Tennessee, Benjamin E. Carmichael, wrote a letter to school authorities informing them that "deficiencies" existed in the county school system and unless a "firm commitment" was made in the direction of correcting these deficiencies no state funds would be released for education in Lincoln County and schools would be closed (regardless of hardships on students, parents, and teachers, who are innocent victims herein).

2) The Commissioner had written several letters of the same import in 1973. This is the only letter written prior to August, 1973, available to plaintiffs; a copy appears in the Minutes of the County Court for August 13, 1973. The Minutes of the Court for August 13, 1973, August 30, 1973, April Term 1974, and June 28, 1974, are attached hereto as Exhibit "A", but need not be copied for service of process.

3) The Commissioner's letter follows a pattern or policy of the various Commissioners since the enactment of the Education Act of 1969 which provides:

> SECTION 21. BE IT FURTHER ENACTED, That the State Commissioner of Education is hereby authorized and empowered to withhold minimum foundation school program funds for current operation and maintenance for public schools, grades one through twelve, or capital outlay funds distributed under the provisions of this Act, or both, from any county, city, or special school district system which has within such school system a school which does not meet the requirements of the State Board of Education for an approved school.

(See also T.C.A. 49-604 cited herein at Paragraph V).

4) The enactment on its face gives the Commissioner a life and death power over local school systems. He makes the rules, alters them at will, and by "waivers", decides whether or not they are obeyed and dispenses punishment; he is at once Legislature, Judge, Executive and Policeman.*

5) The School authorities of Lincoln County informed the County Court of the letters, and on August 13, 1973, the Court met in special session to consider a request from the Lincoln County School Board to appropriate $2 million to construct a single comprehensive high school to be located in the center of the county near, or in, Fayetteville. The plan would necessitate the closing of four community high schools and require extensive busing.

**Schecter Poultry* v. *United States* 295 U.S. 495, 44 S. Ct. 837, 79 L. Ed. 1570 (1935) holds:

"Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation . . . of industry."

"It supplies (Section 3 of the Recovery Act) no standards . . . Instead it authorizes the making of codes to prescribe theirs. The code-making authority thus sought to be conferred is an unconstitutional delegation of legislative power."

Malone v. *Williams* 118 T. 390 holds that where an official had power to decide, whether or not ". . . in his opinion a nuisance exists on public or private property" and then may proceed to . . . "remove such nuisance" that this was "arbitrary power" and that "no man is wise enough or good enough to be vested with arbitrary power over the property of his fellow citizens . . . provisions which give rise to these powers are in violation of Section 8, Article I of our State Constitution, which provides "that no man shall be

taken or imprisoned, or disseized of his free hold liberties or privileges outlawed or exiled in any manner destroyed or deprived of his life, liberty, or property but by the judgment of his peers or the law of the land." They (the provisions) are, therefore, void." (pp. 417-18)

6) The Court rejected the plan but did appropriate $2 million for repairs to existing schools.

7) Dr. Myers, Assistant to Commissioner Carmichael stated that this sum would be sufficient . . "only in connection with a plan for a comprehensive school."

8) The Court met again in Special Session on August 30, 1973, to consider a modified one-high-school plan (set out in the Minutes).

9) The Court finally voted not to appropriate "one cent" of the $2 million for the comprehensive high school until the State of Tennessee matches the sum with a firm commitment for an equal amount.

10) The Court also approved the one-high-school Plan as amended.

11) The Commissioner thereupon allowed the Lincoln County Schools to open. He had forced their closure for ten days in order to compel the County Court and the County School Board to bend to his orders.

12) Plaintiffs aver that both the School Board and the County Court were misled by the State Department of Education. The $2 million to be "contributed" by the State, if the County would build a single comprehensive high school, is appropriated by the State for every county for vocational education; it is not tied to a comprehensive single high school plan and may not be bargained by the State to gain such a plan. Such bargaining is a fraud on the people of Lincoln County and the process of obtaining a comprehensive school plan, approved by the Lincoln County School Board and accepted by the County Court is illegal and the citizens, taxpayers, and parents are damaged thereby.

13) At the regular October meeting the Commissioner sent a letter to the Court saying that he really had not demanded a comprehensive one-high-school plan; he had merely represented that it would be more economically feasible to close community high schools, and buy buses, and build an entirely new high school; and that the Lincoln County Board of Education, and the County Court, had simply accepted his figures at face value and (rather than have all the schools closed) had acceded joyfully to a plan which the Commissioner represented to be the cheapest plan. Neither the Commissioner nor the School Board made any attempt to find out what the people of the various communities preferred for their children in the way of education, cheap or otherwise.

14) At the December 1973 meeting of the County Court some 3,500 petitions (and later some 1,500 more) were presented to the Court asking for a referendum on the bond issue. A copy of one of the petitions is attached hereto as Exhibit "B" but need not be copied for service of process.

15) Plaintiffs aver that several School Board members and several County Court members expressed disapproval of a referendum saying that a "no" vote might cause the Commissioner to close the schools for an extended period.

16) The Court ignored the petitions and began seeking school sites.

17) The April 1974 term of Court authorized the funding of $4 million for the school program by appropriating money in accordance with the minutes of the special session of the Court August 30, 1973. Plaintiffs aver that on the day the County Court authorized the School bond issue it had in its possession, properly filed with the Clerk of the Court, petitions signed by more than ten per cent (10%) of the voters of Lincoln County seeking a referendum to the people on the question of a school bond issue.

18) The June 1974 Court then completed the details of authorizing the bond issue. The parents, citizens and

taxpayers were not allowed to vote on the question.

19) Now that the Comprehensive one-high-school plan is on the verge of reality, the Commissioner has "waived" many demands for improvements on existing buildings made last year; plaintiffs believe and are reliably informed that said demands were simple threats to compel the imposition of a non-neighborhood comprehensive high school on the County and were not bona fide requests for needed repairs.

V.

Plaintiffs would show to the Court that under authority of T.C.A. Sec. 49-108, the State Board of Education and the Commissioner of Education, Benjamin E. Carmichael, adopted "Rules, Regulations and Minimum Standards" and published same in pamphlet form. The statute is quoted in full:

> **49-108.** CLASSIFICATION OF SCHOOLS — CURRICULA. — It shall be the duty of the state board of education to prescribe rules and regulations for the approval and classification of all public schools, grades one (1) through twelve (12), or any combination of these grades; to make regulations for their government; to prescribe curricula and to approve courses of study adopted by local county, city and special school district boards of education upon the recommendation of the superintendent of schools, provided, that such courses of study shall be in accord with the regulations of the state board of education governing the approval of public schools; and, provided further, that the curriculum and course of study of each public school shall include adequate provision for the growth of its pupils in the skills basic to citizenship in American democracy. [Acts 1951, ch. 119, § 1 (Williams, §2316a.]

The Rules and Regulations are attached and made a part hereof but need not be copied for issuance of process, (Ex.

"C"). They set out stringent and detailed requirements under the general headings of:

I. Administrative Rules and Regulations

II. Minimum Requirements for the Approval of Public Schools

III. Minimum Standards for School Attendance Centers, School Sites, Construction of School Buildings, Major Repairs of School Buildings of a Capital Outlay Nature, and Equipment of School Buildings.

IV. Pupil Transportation and Minimum Standards for School Buses.

V. The National School Lunch, Special Milk, School Breakfast and other Food Service Programs in the Public Schools of Tennessee — Grades 1 through 12.

At the end of Part I, "Administrative Rules and Regulations", on page 29, after all the rules in that section have been set out, a general "waiver" is provided as follows:

> "The State Commissioner of Education is authorized to grant waivers of any of these rules and regulations".

On page 58, a similar blanket power of waiver is granted in regard to Section II, "Minimum Requirements for the Approval of Public Schools".

On page 69, at the end of Section III (the section on school buildings) a somewhat more restrictive waiver power is granted in that there the commissioner is required to use his discretion before acting. The precise language is:

> "The State Commissioner of Education is hereby authorized to grant waivers of any of these standards if in his discretion it seems advisable because of factors which might improve the location or facilities for the total school attendance centers".

For Sections IV and V no power of waiver is granted or assumed. (Federal Money involved)

VI.

Plaintiffs would show that under authority of T.C.A. Section 49-604, (B) 1, 2, and 3, (enacted in 1972), the Commissioner of Education is given power "in his discretion", "to enforce" the Rules and Regulations which he created, supra under T.C.A. 49-108.

T.C.A. 49-604 (B) 1, 2, and 3 provide:

49-604. ANNUAL DISTRIBUTION OF MINIMUM FOUNDATION SCHOOL PROGRAM FUNDS — TIME — REQUIREMENTS.

. . . B. In order for any public school system to receive the state funds appropriated for the minimum foundation school program as determined in §49-603, such system shall meet the following conditions and requirements. In order to enforce the same, the state commissioner of education may, *in his discretion*, withhold a portion or all of the state school funds which the system is otherwise eligible to receive.

1. Every school system shall meet the requirements of state law as to the operation of such system.

2. Every school system shall meet the rules, regulations, and minimum standards established by the state board of education for the location, construction and operation of schools.

3. Every school in every school system shall meet the requirements of the state board of education for an approved school. [Acts 1925, ch. 115, §17; Shan. Supp., §1487a124; Code 1932, §2416; Acts 1972 (Adj.S.), Ch. 693, §6.]

VII.

T.C.A. 49-602 E provides:

E. *Capital Outlay*

There shall be included in the minimum foundation school program an amount to be used exclusively for

the purpose of capital outlay, including the purchase and improvement of sites, the construction of buildings, the remodeling or renovation of buildings, the purchase of equipment for schools and school buildings, and the purchase of pupil transportation equipment, for the public schools of this state, which sum shall be distributed by the state commissioner of education as provided in this chapter among the public school systems of the state upon the conditions hereinafter prescribed in this subsection. The amounts of funds so distributed to each school system under the provisions of this subsection may be used in the discretion of the local board of education for the payment of the principal and interest on any bonds of original issue or other forms of legal indebtedness of original issue, issued by the system for school capital outlay purposes since July 1, 1947, including school bonds refunding school capital outlay bonds of original issue since July 1, 1947.

AND E 9 and **10** provide:

9. The *state funds* for the public schools for capital outlay purposes distributed under the provisions of this Chapter shall be obligated and expended *only* according to *a plan* (a) *recommended by the local superintendent of schools* and *approved by the local board of education*, (b) filed with the state commissioner of education on or before August 1 of the current school year, on forms prescribed by him, and (c) *approved by the state commissioner of education*. However, such plan may be amended during the school year to meet changing conditions or emergencies, but such amendment shall be filed with, and approved by, the state commissioner of education before any funds referred to hereinabove in this paragraph shall be obligated or expended for the purpose of the amendment.

10. The state board of education shall establish

minimum standards for school sites, including locations, school attendance centers, the construction of buildings for school purposes, the remodeling or renovation of buildings for school purposes of a capital outlay nature, and for equipment for buildings for school purposes. No local *board of education shall obligate* or expend any *state* or *local* school funds for any project of a capital outlay nature which does not conform to the standards adopted by the state board of education as authorized in this paragraph.

VIII.

Plaintiffs would show, that in spite of language in the statutes above quoted (which seem to intend that the local boards of education shall have power and discretion) actually, as a matter of practice, the Lincoln County School Board has been deprived of its discretion by the weight, power, and influence of the Commissioner of Education who has illegally used his power to deprive the County School Board of its right of discretion.

The Commissioner of Education has written letters to the School Board which amount to threats that if the School Board fails to present plans to the Commissioner, which the Commissioner "recommends", then State funds will be denied to Lincoln County under the Commissioner's "discretionary" and/or "waiver" powers. Copies of some of the letters are here attached as collective Exhibit "D", but are not to be copied for issuance of process. Plaintiffs have asked the Commissioner for copies of all letters but they have not been forthcoming.

The School Board Minutes reveal that the Board was persuaded to accept all cost estimates of various school plans presented and recommended by the Commissioner of Education, *without ever making an independent cost study of its own.* This is a gross failure to exercise discretion. (The Minutes of the School Board are attached as Exhibit "E",

but are not to be copied for issuance of process).*

Plaintiffs are reliably informed and verily believe that the School Board of Lincoln County never properly voted upon or discussed in regular meeting the one-high-school plan which was finally presented to the Quarterly Court of Lincoln County. In all these matters, they, therefore, acted illegally.

IX.

The statutes controlling bond issues for schools in Tennessee enacted in sequence are:

T.C.A. 49-701 (1911). ISSUANCE BY COUNTY COURTS AUTHORIZED. The counties through their respective quarterly county courts are authorized to issue and sell bonds for the purposes and in the manner provided in this chapter.

T.C.A. 49-702 (1911). RESOLUTION FOR ISSUANCE-MAXIMUM AMOUNT OUTSTANDING. Said bonds may be issued by the quarterly county court of any county be resolution adopted by a majority of the members of said quarterly county court at any regular, special or adjourned meeting thereof; provided, however, that no county shall issue bonds hereunder in an amount which, together with all other bonds of said county then outstanding which were issued under authority of this chapter, will exceed ten per cent (10%) of the assessed value of the taxable property within such county. Notwithstanding the preceding limitation, said bonds may be issued in excess of ten per cent (10%) of the assessed valuable of the taxable property within such county if prior to the sale thereof, approval thereof shall be obtained from the commissioner of education of the state of Tennessee. Such approval shall be in writing and shall be recorded in the minutes of the quarterly county court of the county issuing such bonds.

*At time of filing, the minutes were not yet available.

T.C.A. 5-1001 (1923). POPULAR VOTE TO AUTHORIZE BONDS. EXCEPTIONS. — Any bonds authorized to be issued by any of the counties, upon the faith and credit of such county, for public purposes, shall only be upon an election to be first held by the qualified voters of such county and the assent of a majority of the votes cast in said election; provided, that nothing in this section shall be construed as applicable to renewal or refunding bonds; provided, further, that nothing in this section shall be construed as applicable to the issuance of bonds for the building of a courthouse in any county in which the courthouse has been destroyed. Nothing in this section shall interfere with or affect any present enabling act for state and federal aid for the construction of state and federal roads.

T.C.A. 49-201 (5) (1925). DUTIES OF QUARTERLY COUNTY COURT. (5) To submit to the voters of the county, at any regular session, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority case in said election, to issue said bonds in accord therewith.

T.C.A. 5-1024 (1957). ELECTION — WHEN REQUIRED. — No vote of the registered voters upon a proposition for the issuance of bonds by any county shall be necessary if the said initial resolution is adopted by a majority of the members of the governing body of such county unless within ten (10) days of the date of publication or posting, as the case may be, of the initial resolution so adopted, a petition, signed by at least ten per cent (10%) of the registered voters of the county, or of that portion thereof which is liable to be taxed therefor, as the case may be, shall have filed with the county court clerk protesting the issuance of the bonds. If a petition protesting the issuance of such bonds signed by as many

as ten per cent (10%) of the registered voters as aforesaid shall have been filed with the county court clerk within ten (10) days from the publication or posting of the initial resolution, then no bonds shall be issued without the assent of a majority of the registered voters affected thereby voting upon a proposition for the issuance of such bonds in the manner provided by §5-1025. No registered voter shall be permitted to withdraw his signature from such petition after signing the same. Notwithstanding any of the provisions of this section the governing body of the county may if it desires call an election as provided herein for the purpose of ascertaining the will of the registered voters with respect to the issuance of the bonds.

Plaintiffs aver upon a plain reading of the above statutes, culminating in T.C.A. 49-201, that the County Court of Lincoln County has a duty, upon receipt of an independently conceived plan for school expenditures from the County Board of Education, to submit any consequent bond issue to a referendum of the people; this the Court failed to do and, therefore, acted illegally in authorizing the 1974 School Bond Issue.

X.

Plaintiffs aver further, that the County Court had in its possession petitions from ten per cent (10%) of the registered voters when it voted to authorize the Bond issue of 1974, and ten (10) days successive thereafter. To fail to hold a referendum under the circumstances is a violation of T.C.A. 5-1024; therefore, plaintiffs aver that the Board authorization was illegally achieved and that Plaintiffs are damaged thereby and the "authorization" should be abrogated and a referendum ordered.

XI.

There is a real controversy between the parties in that the State defends the constitutionality of T.C.A. 49-604 (B) 1, 2,

and 3; T.C.A. 49-602 (E) 9 and 10, The Education Act of 1969, and its Section 21 in particular, and the complainants attack these measures. The Commissioner of Education defends his exercise of power, and his manner in so doing, in withholding funds, as constitutional, and plaintiffs contend to the contrary.

Plaintiffs aver that they have a constitutional and statutory right to a referendum on the funding of a new school system; the defendants deny this right.

Plaintiffs assert that their constitutional rights listed in Paragraph XII (following) have been violated; defendants deny this.

XII.

Plaintiffs aver that as parents and taxpayers they are, in summary, injured in the following respects:

The Public Education Act of 1969 as amended is unconstitutional in that it grants unfettered and undelegable powers to the Commissioner of Education, and/or it is unconstitutional as administered; further plaintiffs are denied their right to a referendum:

All in violation of Article I, Sections 1, 2, 5, 8 and 21; Article II, Sections 1, 2, 3, (See footnote 7), 17 and 29 (See footnotes 6 and 9) and Article XI, Sections 16 and 17 of the Constitution of Tennessee:

ARTICLE I

Section 1. ALL POWER INHERENT IN THE PEOPLE. GOVERNMENT UNDER THEIR CONTROL. - That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

Section 2. DOCTRINE OF NONRESISTANCE CONDEMNED. That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Section 5. ELECTIONS TO BE FREE AND EQUAL. RIGHT OF SUFFRAGE. - The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Section 8. NO MAN TO BE DISTURBED BUT BY LAW. - That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Section 21. NO MAN'S SERVICES OR PROPERTY TAKEN WITHOUT CONSENT OR COMPENSATION. That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

ARTICLE II

Section 1. DIVISION OF POWERS. The power of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

Section 2. LIMITATION OF POWERS. - No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Section 3. LEGISLATIVE AUTHORITY - TERM OF OFFICE. The Legislative authority of this State shall be

vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Section 17. ORIGIN AND FRAME OF BILLS. - Bills may originate in either House; but may be amended, altered or rejected by the other. No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended.

Section 29. COUNTIES AND TOWNS - POWER TO TAX - CREDIT. The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election.

ARTICLE XI

Section 16. BILL OF RIGHTS TO REMAIN INVIOLATE. - The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.

Section 17. COUNTY OFFICES. - No County office created by the Legislature shall be filled otherwise than by the people or the County Court.

XIII.

PREMISES CONSIDERED, PLAINTIFFS PRAY:

1. That proper process issue and be served on defendants requiring them to appear and answer this Bill, but not under oath, their oath being expressly waived.

2. That this action be maintained as a class action.

3. That the Court herein determine the issues presented by this action under the Declaratory Judgement Act and that the Court declare those portions of the Public Education Act of 1969, as amended, and the Rules and Regulations deriving therefrom which grant undelegable and unfettered powers, to be unconstitutional, on their faces and as applied.

4. That after a hearing the County Judge of Lincoln County and the County Court of Lincoln County and its members be enjoined from any and all acts in furtherance of the bond issue in question.

5. That after a hearing the Commissioner of Education be enjoined from continuing the exercise of unconstitutional powers or the unconstitutional and illegal exercise of any powers as complained of herein.

6. That the Quarterly Court be enjoined from denying to the people of Lincoln County a referendum on the bond issue in question.

7. That, as a result of this suit, should the Commissioner of Education attempt to exercise the powers here challenged and proceed to cut off school funds from Lincoln County, he be enjoined from withholding payment of funds to said county pending the outcome of this litigation.

8. That the plaintiffs be awarded such other, further and general relief as may be deemed meet and proper.

/s/ Jack Kershaw

Solicitor for Plaintiffs

Jack Kershaw
B-3 Stahlman Building
Nashville, Tennessee 37201

EDWARD MITCHELL, ET AL

VS. NO. A-4207

SAM INGRAM, ET AL

FILED
FEB. 1975
ED STEELMAN
D.C. & M.

IN THE CHANCERY COURT, PART ONE, AT NASHVILLE.

MEMORANDUM

By previous orders of the Court this cause was retained for further determination as to whether or not the complaint had stated a cause of action against the Commissioner of Education. The parties have briefed and argued the motion to dismiss as to the defendant, Commissioner, and it is now ready for determination.

The Court is of the opinion that the allegations in the instant case, with respect to the cause of action against the Commissioner, are identical to the allegations in the former case of *Young v. Warf,* No. A-1536 (decided September 21, 1972). In that case the Judge dismissed the action on the ground that the plaintiffs had no standing to bring the action. In that case the Court said:

> "This Court is of the opinion that the averment of the complaint that plaintiffs are citizens, property owners, taxpayers, and parents of children, attending the public schools of Giles County, is insufficient to confer on plaintiffs the requisite standing to attack the constitutionality of Section 21, Chapter 294 of the Public Acts of 1969."

The reasoning of the Court in that case was based on the opinion of the Supreme Court in *Alton White, et al v. J. H. Warf, et al,* in an unpublished opinion rendered in 1972.

On the reasoning of the Court in the two above cases, this Court is of the opinion that the same lack of standing is present in this case and it should be dismissed.

General Haile will prepare the decree. Let the costs be taxed to the plaintiffs.

/s/ Ben H. Cantrell
Ben H. Cantrell, Chancellor

This February 24, 1975

xc: Mr. Jack Kershaw
Mr. W. Henry Haile

Decree Entered October 9, 1974—M.B. 208, Page 312

IN THE CHANCERY COURT OF DAVIDSON COUNTY, PART ONE, AT NASHVILLE, TENNESSEE.

EDWARD MITCHELL, ET AL

VS. NO. A-4207

BENJAMIN E. CARMICHAEL, ET AL

DECREE DISMISSING SUIT AS TO LINCOLN COUNTY OFFICIALS.

This cause came on to be heard before the Honorable Ben H. Cantrell, Chancellor, etc., in open Court, on this the 30th day of September 1974, upon the Complaint filed in this cause, the motion to dismiss filed on behalf of Defendants, the argument of Counsel, the Memorandum opinion of the Court dated September 30, 1974, and upon the entire record in this cause, from all of which the Court is of the opinion and doth decree:

I.

That this case insofar as it pertains to the Lincoln County

public officials is a local action and this Court is without jurisdiction to hear it.

II.

That this cause must be dismissed as to all the Lincoln County officials named as Defendants.

III.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this cause be and is hereby dismissed as to all the Lincoln County officials named as Defendants, and specifically this case is hereby dismissed as to the Lincoln County Quarterly Court, and each and every member thereof, said Quarterly Court being composed of Lyle M. Franklin, W. F. Philpot, Joe D. Taft, Frank E. Graham, Howard Capshaw, Howard Monks, V. H. Barnes, Billy Parker, Paul Barham, Cecil Ellis, Pangle Stewart, Wm. R. Carter, Fred Young, J. T. Wyatt, Wm. S. Jakovina, Herman Montgomery, L. C. Curtis, Johnny Stevenson, H. Parsons, Jr., Freeman Towry, Dr. T. H. Bullington, Knox Stewart, Cecil Cooke, Clyde Forrester, Roy Sweeney, Con S. Massey, E. C. Collins, Thos. E. Hudson, Melvin Howell, J. T. Walker, Leonard Mansfield and Earl Vann.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case be and is hereby dismissed as to Taylor Crawford as County Judge and Fiscal Agent of Lincoln County, Tennessee, and as to Richard Waggoner, Administrator of the Lincoln County School System.

AND this cause is likewise dismissed as to the Board of Education of Lincoln County, Tennessee, and each and every member thereof, said Board being composed of Robert Currey, Charles Ray Ables, Wm. T. Medley, Jas, W. Smith, R. E. Burroughs, C. H. Hardy, Tully Buchanan, Wm. D. Jones and John T. Towry.

THIS cause is further dismissed as to Chapman and Cutler, inasmuch as this firm is not a proper party to this suit; and is likewise dismissed as to Ernest Pendergrass and Brimage L. Smith, former members of the Board of Education of Lincoln County, Tennessee, whose terms expired on August 31, 1974, but who are named as Defendants in the complaint. The Court retains jurisdiction of the case against the defendant Benj. Carmichael and reserves judgement on whether or not the complaint states a cause of action against him.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs incident to the filing of this cause against the public officials of Lincoln County, Tennessee is taxed against Plaintiffs, for which execution may issue.

ENTER:

/s/ Ben H. Cantrell

Chancellor

APPROVED

/s/ Jack Kershaw

Jack Kershaw

Attorney for Plaintiffs

/s/ W. Henry Haile

W. Henry Haile

Assistant State Attorney General
representing all State Officials

/s/ Robert W. Simms

Robert W. Simms

Attorney for Lincoln County Quarterly Court, County Judge and Fiscal Agent of Lincoln County, Tennessee, Board of Education of Lincoln County, and Administrator of the Lincoln County School System.

Decree Entered December 11, 1974—MB. 209, Page 34

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
PART I .

EDWARD MITCHELL, et al

vs.

BENJAMIN E. CARMICHAEL, *et al* } No. A-4207

ORDER

Upon consideration of oral argument the entire record herein, the court is of the opinion that plaintiffs Motion for a new trial should be overruled and that plaintiffs should have 30 days from the entry of this order to perfect their appeal.

It is so ordered.

/s/ Ben H. Cantrell
Chancelor

I certify that I have on this _____ day of December, 1974, mailed copies of this Order to Hon. W. Henry Haile, Assistant Attorney General, Supreme Court Building, Nashville, Tennessee; Hon. Robert Sims, County Attorney for Lincoln County, Lincoln County Courthouse, Fayetteville, Tennessee.

/s/ Jack Kershaw
Jack Kershaw

Decree Entered November 11, 1975 — M.B. 212, Page 363

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

EDWARD MITCHELL, ET AL.,
Plaintiffs

V.

BENJAMIN E. CARMICHAEL, ET AL.,
Defendants } No. A-4207

ORDER

Plaintiff's motion for a new trail is denied.

Plaintiff's motion to amend their complaint is denied.

From this ruling, plaintiff excepts and prays an appeal which is granted.

So ORDERED this _____ day of November, 1975.

/s/ Ben H. Cantrell
CHANCELLOR

APPROVED FOR ENTRY:

/s/ Richard Lodge
RICHARD LODGE
Assistant Attorney General
412 Supreme Court Building
Nashville, Tennessee 37219
Attorney for Defendants

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EDWARD MITCHELL, ET AL
Appellants

vs.

BENJAMIN E. CARMICHAEL, ET AL
Appellees

For Publication

FILED
MAR 31, 1975
RAMSEY LEATHERS
CLERK
SUPREME COURT

Davidson Equity
Hon.
Ben H. Cantrell,
Chancellor

For Appellants:	*For Appellees:*
Jack Kershaw Nashville, Tennessee	Robert W. Simms County Attorney Fayetteville, Tennessee
	W. Henry Haile Ass't Attorney General Nashville, Tennessee

OPINION

This action was instituted to the Chancery Court of Davidson County, Tennessee by citizens of Lincoln County, against the Commissioner of Education of Tennessee and the State Attorney General and other State officials. Also joined as defendants were the County Judge of Lincoln County, Tennessee and a number of other county officials.

Following the release of the opinion of this Court in the case of *Adams v. State ex rel Chattanooga Coke & Chemicals*, 514 S.W.2d 424 (Tenn. 1974), on September 30, 1974, the Chancellor, *sua sponte*, dismissed the action as to the Lincoln County defendants upon the ground that the Chancery Court of Davidson County, Tennessee had no jurisdiction to determine the issues as to those defendants.

Although there is no order in the record before us praying for and allowing any sort of appeal, there is an order overruling a motion for a new trial and purporting to extend the time to allow the appellants to perfect their appeal.

There is no certification or other compliance with T.C.A. §27-305, as amended, purporting to permit an interlocutory appeal in this case. Accordingly, for the reasons stated in *Frame v. Marlin Firearms Co., Inc.*, 514 S.W.2d 728 (Tenn. 1974), the interlocutory appeal filed in this Court by the appellants is dismissed at their cost.

Because of the public nature of the subject matter of this litigation and related litigation pending in the Chancery Court of Lincoln County, Tennessee, and pursuant to the supervisory jurisdiction of this Court, T.C.A. § 16-331, and its inherent power over the administration of justice and the conduct of attorneys in this state, the following directions are given, and a copy of this opinion will be furnished the Chancellor of the Chancery Court of Lincoln County, Tennessee for his information and guidance.

Following dismissal of their action in the Davidson County Chancery Court as to the Lincoln County defendants, appellants instituted an identical action in the Chancery Court of Lincoln County, Tennessee against the Lincoln County defendants and also against the State officials who had been joined in the Davidson County case. It is the information of this Court and the Chancery Court at Nasvhille has subsequently dismissed the Davidson County litigation as to the State officials, as well as to the Lincoln County officials in reliance upon previous decisions of this Court in 1972 and 1973 in the cases of *White v. Warf*, No. 93495 and *Young v. Warf*, No. A-1536.

Accordingly the Davidson County litigation now stands entirely dismissed. Although there may be an appeal from the final dismissal of the action at Nashville, this Court sees no reason for delay in the setting and disposition of the

Lincoln County case by reason of possible appellate proceedings in the Nashville case.

The Lincoln County suit, which is identical to that which had been filed in Nashville, is also very similar to the proceedings which were the subject of the two unpublished opinions of this Court in 1972 and 1973 above cited. The litigation seeks to prevent the consolidation of certain schools in Lincoln County, Tennessee. A public bond issue, approved by the Quarterly County Court of that county, is being delayed because of the pendency of these actions.

This Court, under its supervisory jurisdiction, will not permit an abuse of legal processes of this state for the purpose of harassment or delay. Every litigant or claimant in this state will be afforded an opportunity to present any meritorious claims he may have. No litigant will be permitted deliberately to harass public officials or delay the transaction of public business.

The oath of an attorney under which he is permitted to practice law in this state, as well as the ethical requirements of Rule II of the Tennessee Rules of Civil Procedure, requires that no attorney engage in harassing or unconscionable litigation.

We express no opinion whatever upon the merits of the Lincoln County litigation. We direct the Chancellor, however, to expedite the handling thereof and to set the same for hearing upon the issues presented under the pleadings as quickly as possible.

We recognize that a legitimate question may exist as to whether state officials may be used in another county, other than the county of their official residence, in proceedings such as these. "Where, single spaced however, there are bona fide and material local defendants resident in the county of suit, rather than immaterial or token defendants, it may be possible to bring state officials into the county by counterpart service of process. In all events, in the present case, the state officials have willingly submitted to the

jurisdiction of the Lincoln County Chancery Courts, and have stated at the bar of this Court that no issue will be raised in those proceedings as to such jurisdiction or as to the validity of any judgment which may be rendered by that Court, insofar as the matters of venue and jurisdiction are concerned."

Accordingly, the Lincoln County suit will proceed with dispatch, and any appellate proceedings therein or in the Davidson County case will also be expedited to the maximum extent possible.

The Chancellor at Fayetteville and the Chancellor at Nashville are directed to advise the Clerk of this Court at Nashville of any attempts at vexatious delay or harassment which may come to their attention, and the proceedings both in Davidson County and in Lincoln County will continue under the direct and close supervision and scrutiny of this Court.

The reason for this extraordinary action on the part of this Court are apparent from the record and from the two unpublished decisions of this Court previously referred to. This Court will not tolerate the thwarting of the issuance and sale of public bonds by vexatious litigation. Certain statements attributed to counsel for the appellants were read from newspaper articles at the bar of this Court, and were not denied. These statements were of a serious nature and indicated an intention on the part of counsel deliberately to delay the bond issue until building costs have so risen that the proposed school construction can no longer proceed. This is precisely what occurred in the Giles County litigation, which was the subject of the two unreported cases previously referred to. There litigation prosecuted by persons having no standing to sue was permitted to block an otherwise authorized and approved consolidated school project.

This Court, on the other hand, does not in any sense intend to intimidate any person or claimant having standing

from prosecuting litigation and raising issues as to the validity of public bond issues and the actions of local or state officials, where the litigation is commenced in good faith and bona fide issues are presented, whether these are ultimately sustained or not.

Enter at Nashville, Tennessee, this 31st day of March, 1975.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EDWARD MITCHELL, *Et Al*

Appellants

vs.

BENJAMIN E. CARMICHAEL, *Et Al*

Appellees

FILED
MAY 5, 1975
RAMSEY LEATHERS
CLERK
SUPREME COURT

Davidson Equity

OPINION ON PETITION FOR REHEARING

A petition for rehearing was filed in this cause on April 9, 1975. The Court has considered the petition and the reply filed thereto, and is of the opinion that the petition for rehearing is without merit. The same is accordingly overruled.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Not for publication

EDWARD MITCHELL, et al.,

Appellants,

vs.

SAM INGRAM, Commissioner of Education, et al.,
(Substituted for Carmichael)

Appellees.

FILED
APR 15 1976
RAMSEY LEATHERS
CLERK
SUPREME COURT

Davidson Equity
Hon. Ben H. Cantrell,
Chancellor

For Appellants:	*For Appellees:*
Jack Kershaw Nashville, Tennessee	Richard Lodge Assistant Attorney General Nashville, Tennessee
	Robert Simms Fayetteville, Tennessee

OPINION

This action was instituted by appellants, residents, citizens and taxpayers of Lincoln County, Tennessee, against the State Commissioner of Education, the State Board of Education, and a number of Lincoln County officials. The action was dismissed as to the Lincoln County officials, and a subsequent suit was filed against them and the State officials in Lincoln County. After a trial on the merits, that case was dismissed. On appeal, the Court of Appeals affirmed the decision of the trial court, and this Court denied certiorari in the action on April 1, 1976.

In the meanwhile, appellant attempted an interlocutory appeal of the dismissal of the Lincoln County officials from the suit in Davidson County. This interlocutory appeal was

considered in this Court in the case of *Mitchell v. Carmichael,* 522 S.W.2d 869 (Tenn. 1975).

The interlocutory appeal was not properly perfected, and the cause was thereupon remanded to the Chancery Court at Nashville. Subsequently the Chancery Court at Nashville dismissed the action in its entirety, the final order being entered in November 1975. An appeal was prayed but not perfected, but appellants thereafter filed the record for review in this Court on writ of error. The principal assignments of error contained in the brief are to the effect that the State officials, particularly the Commissioner of Education, were material defendants, and that venue had properly been fixed in Davidson County against them, so that the Lincoln County Officials could be impleaded in Davidson County by counterpart service of process. It is now contended that the entire trial and proceedings conducted in the Chancery Court of Lincoln County are void, because of lack of jurisdiction there.

We consider the contentions of the appellants to be without merit. Insofar as their complaint against the State officials is concerned, we consider the action to be controlled by the decision of this Court in the case of *Sanders v. Carmichael,* 527 S.W.2d 92 (Tenn. 1975). Further, plaintiffs have had a trial on the merits of the suit which they brought in Lincoln County, and they may not now attempt to relitigate those same issues in this action.

In the previous opinion of this Court it was pointed out that this action and the Lincoln County action had the effect of delaying the issuance of a large public bond issue in connection with the consolidation of certain schools in Lincoln County. That bond issue has now been long impeded by virtue of these two actions, and it is entirely improper that any further delay should be encountered by the public officials of Lincoln County in consummating the issuance of these bonds.

The judgment of the Chancery Court at Nashville is in all

things affirmed, and the writ of error is dismissed at the cost of appellants.

/s/ William J. Harbison

William J. Harbison, Justice

Fones, C.J., Cooper and
Brock, JJ., concur.

Henry, J., not participating.

IN THE CHANCERY COURT OF LINCOLN COUNTY, TENNESSEE

EDWARD MITCHELL, *et al*

vs.

JUDGE TAYLOR CRAWFORD, *et al*
(The Complaint herein is identical with the Compiaint filed in *Mitchel* vs *Carmichael)*

AMENDED AND SUPPLEMENTAL COMPLAINT

Come the Plaintiffs herein, and under authority of Rule 15, TRC, ask leave of the Court to add the following parties as parties Plaintiffs in this cause at their request:

Nancy Jean Mitchell, a minor by next friend Edward Mitchell; Steven Sheppard, Cynthia Sheppard and Randall Sheppard, minors by next friend Howard Sheppard; Vincent Higgins and Kevin Higgins, minors by next friend Jack Oaks; Debora Redden, Cynthia Redden and Robert Calvin Redden, minors by next friend C. T. Redden.

Jack Kershaw
Solicitor for Plaintiffs

EDWARD MITCHELL, ET AL.,

Plaintiffs-Appellants

VS.

JUDGE TAYLOR CRAWFORD, ET AL.,

Defendants-Appellees

Filed
JAN 30 1976
RAMSEY LEATHERS
CLERK
COURT OF APPEALS

LINCOLN
EQUITY

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF LINCOLN COUNTY, TENNESSEE
HONORABLE JOHN D. TEMPLETON, CHANCELLOR

FILED:

JACK KERSHAW
3710 Lealand Lane, Nashville, Tennessee
ATTORNEY FOR PLAINTIFFS-APPELLANTS

Robert W. Simms, County Attorney, Lincoln County, Tennessee Fayetteville, Tennessee

R. A. Ashley, Jr., Attorney General, State of Tennessee
Richard Lodge, Assistant Attorney General, State of Tennessee Supreme Court Building, Nashville, Tennessee
ATTORNEYS FOR DEFENDANTS-APPELLEES

THOS. A. SHRIVER
PRESIDING JUDGE

EDWARD MITCHELL, ET AL.,

Plaintiffs-Appellants

VS.

JUDGE TAYLOR CRAWFORD, ET AL.,

Defendants-Appellees

LINCOLN
EQUITY

OPINION

I. The Case

Certain taxpayers and certain parents of school-children and several schoolchildren, by next friend, filed their bill under the Declaratory Judgment Act, seeking relief from actions of the School Board of Lincoln County and the action of the Quarterly County Court of that County in authorizing the issuance of $4,000,000.00 of school bonds for the improvement of the schools of the County and the building and establishment of a central Consolidated High School at or near Fayetteville, Tennessee.

After an extended hearing, the Chancellor denied the relief sought by plaintiffs and dismissed their bill, from which action plaintiffs have appealed to this Court and have assigned errors.

II. The Proceedings Below

Appellants originally filed their suit in the Chancery Court at Nashville and, following an appeal from the Davidson County Chancery Court to the Supreme Court, the case was sent back with instructions that it be proceeded with in the Chancery Court of Lincoln County with dispatch, it having been shown that the school bond issue was being delayed because the County could not deliver a "No Litigation Certificate" to prospective purchasers of the bonds and,

thus, the program of building, repairing and improving existing school buildings and the erection of a new High School in Lincoln County in order to meet the minimum State requirements, could not be proceeded with.

It is shown that the Lincoln County School System in the year 1973 and prior years failed to meet minimum State standards and the local authorities were so notified by the State Commissioner and the State Board of Education. Following numerous discussions between the State and County School Officials, plans were made and approved by the State and local authorities for the building of one comprehensive High School near the center of the County and the remodeling of other schools so as to meet minimum State standards.

A $4,000,000.00 school bond issue was voted by a majority of the members of the Quarterly County Court of Lincoln County on June 28, 1974 under the authority of T.C.A. Sec. 49-701, et seq., with the understanding and agreement that the State of Tennessee would make available an additional $2,000,000.00 for certain facilities in connection therewith.

Following a hearing on the merits, Chancellor John D. Templeton entered a Final Decree on July 14, 1975 wherein he set forth in a clear and concise manner the history of the litigation and the proceedings below, together with his findings of fact and conclusions of law, which decree and judgment is so well reasoned that we quote it in full, as follows:

"FINAL DECREE"

This cause came on to be heard before the Honorable John D. Templeton, Chancellor, etc., in open Court, Fayetteville, Lincoln County, Tennessee, on June 17, 1975, upon the complaint of the plaintiffs, the exhibits thereto, the answer of the Lincoln County defendants, the answer of the State of Tennessee Officials, upon written motions filed, and others made orally in open Court, the Briefs heretofore filed, the previous orders of the Court, the entire record in the cause,

and upon the oral testimony of witnesses heard in open Court, and at the conclusion of the first day's hearing, the Court was adjourned and continued until 10:00 A.M., on June 20, 1975, in Shelbyville, Bedford County, Tennessee, when this matter came on to be further and finally heard upon the entire record in the cause, upon the additional oral testimony of witnesses introduced at that time, and upon argument of counsel, at the conclusion of all of which the Court is of the opinion and doth find and decree as follows:

That the $4,000,000.00 bond issue by Lincoln County, Tennessee, as shown by the Minutes of the Quarterly County Court of Lincoln County, Tennessee at the July 28, 1974 Special Session, is to be issued under authority of Tennessee Code Annotated, Section 49-701, et seq., by which authority no referendum is required, and the previous orders of this Court to this effect following the pre-trial conference are sustained and reaffirmed.

The Court further finds and decrees that the Statutes of this State, with reference to the educational system, imposed a number of duties and requirements upon various State and County Officials in order that all children within the State shall be provided with a school system and school facilities which meet minimum standards required by the State of Tennessee. Tennessee Code Annotated, Section 49-106, provides for the appointment of a State Board of Education whose duties, among other things, is to prescribe rules and regulations for the approval, classification and governance of all public schools (see T.C.A., Sec. 49-108), that it is the duty of the State Commissioner of Education to see that these rules, regulations and minimum standards are made available to all school systems and that the various local school systems shall be operated in compliance with these rules, regulations and minimum standards. (T.C.A. Sec. 49-105).

The Court further finds and decrees that it is the duty of the Commissioner and/or the State Board of Education,

under State Statute, to require of the local County Educational Officials that all local or County schools meet the minimum standards prescribed by the State, and in the event of the failure of a local or County school to meet these requirements, the State Commissioner of Education, under authority of Tennessee Code Annotated, Section 49-604(b) has the right to withhold minimum foundation school program funds from the local or County system until these minimum standards are met.

The Court further finds and decrees that it is the duty of the County Board of Education to investigate and be aware of the needs and any deficiencies existing in its school system and that each Local or County school system is charged under State law with the duty of maintaining its local system in such a manner as to at least meet the minimum standards prescribed by the Tennessee State Board of Education; that the Quarterly County Court of each County in the State is authorized to sell general obligation bonds of the County under the authority of Tennessee Code Annotated, Section 49-701, et seq., for the purpose of purchasing sites and building and maintaining County school buildings.

In this case, the proof shows conclusively that for a number of years Lincoln County's School System has failed to meet the minimum standards as prescribed by the State Board of Education. Following an investigation of the County School System, as shown by a report filed in December of 1972, a number of deficiencies existed, that prior to this, the State Commissioner of Education had on occasions issued waivers with reference to certain deficiencies but prior to the opening of schools for the year 1973, the State Commissioner of Education had informed the local School Board and the Quarterly County Court that he could no longer in good conscience issue waivers for these deficiencies and that prior to the opening of school in the Fall of 1973, it would be necessary that definite steps be

taken to alleviate the deficiencies and bring Lincoln County School System at least up to the minimum standards required by the State Board of Education.

The proof is clear that numerous meetings were held between State and local authorities concerning these deficiencies as well as numerous meetings and communications between the School Board and Quarterly County Court.

The School Board discussed a number of plans and made a number of recommendations, many of which are reflected in the Minutes of the County Board of Education and of the Quarterly County Court.

On August 13, 1973, the Quarterly Court met in Special Session to consider an appropriation of school funds to help alleviate the deficiencies then existing, and, although the Court did take action, it did not in actuality, at the August 13, 1973 Special Session, appropriate any funds, and as a result the opening of Lincoln County's schools was delayed approximately one week, the latter part of August 1973, until the matter could be further considered by the Quarterly County Court.

The question has been raised about a comment made by Dr. Myers, a State Department of Education official, at the August 13, 1973 Special Session of the Quarterly County Court. It is clear from the context of these remarks that Dr. Myers did not demand that a comprehensive high school be built. He simply indicated to the Court that the $2,000,000.00 program would be inadequate by itself to correct the deficiencies then existing in the Lincoln County School System.

The State Legislative by virtue of T.C.A., Sec. 49-2709, which became effective in May of 1973, delegated to the State Commissioner of Education and/or the State Board of Education the duty of implementing vocational schools throughout the State prior to September of 1977. Following

negotiations between the Commissioner of Education, the State Department of Education, and the Lincoln County School Board, action was taken by the Lincoln County School Board, which met the approval of the State authorities to recommend to the Quarterly County Court of Lincoln County, Tennessee a plan for the renovation, remodeling and the erection of school buildings in Lincoln County under a plan which called for the elimination of three high schools in rural Lincoln County, the building of one new comprehensive high school near Fayetteville and the remodeling of other schools in Lincoln County so as to bring all of Lincoln County's schools up to the minimum State standards. Under this plan $1,975,000.00 was to be used for the remodeling and renovation of the elementary schools of Lincoln County, grades Kindergarten through 9, so as to meet minimum State standards utilizing the then existing school buildings in various communities with the further plan to build and erect a new comprehensive vocational school at a cost to Lincoln County of $2,025,000.00 upon the condition that the State of Tennessee furnish approximately $2,000,000.00 for the vocational facilities in connection with the building of the comprehensvie combination high school and vocational building, it being understood that the County would not be required to proceed with the new comprehensive high school facilities until such time as the State had made available its share of approximately $2,000,000.00 for the vocational facilities, all of which is reflected in the Minutes of the Quarterly County Court at the August 30, 1973 session and in the Minutes of the Board of Education of this same date.

It appears to the Court that by virtue of this plan and by the actions of the Quarterly County Court and the Board of Education as well as State officials that there was a meeting of the minds as to the procedures to bring Lincoln County's school system up to meet minimum State standards required, and, pursuant to this plan, the Lincoln County Quarterly Court by resolution at its July 28, 1974 Special Session

authorized the issuance of $4,000,000.00 in school bonds for the purposes above indicated, the State having made available its $2,000,000.00 for the vocational facilities as agreed upon.

Following the adoption of the bond resolution, Lincoln County advertised the sale of its bonds and sealed bids were to be received for the sale of said bonds on September 17, 1974; however, plaintiffs on the 28th day of August 1974 instituted their suit in the Chancery Court of Davidson County, Tennessee against the various State and County defendants, which had the effect of halting or stopping the sale of said bonds inasmuch as Lincoln County was unable to deliver to the prospective purchaser a no litigation certificate. These plaintiffs in the Davidson County suit later filed their suit in the Chancery Court of Lincoln County, Tennessee, which suit is an identical suit to that brought in Davidson County.

Plaintiffs in this suit contend that Tennessee Code Annotated, Section 49-604(b), is unconstitutional and pray a declaratory judgment as to the constitutionality of the same, and contend that State and County officials have acted improperly and illegally. Plaintiffs further ask the Court to issue an injunction against the Quarterly County Court and the County Judge in the sale and issuance of Lincoln County's school bonds; further ask the Court to hold that the State Commissioner of Education has and was exercising illegal powers; seek a referendum on the bond issue question, and further ask that the Commissioner of Education be enjoined from withholding funds from Lincoln County pending the outcome of this suit. The State and County Officials have duly answered plaintiffs' complaint denying any illegal action on the part of any County or State Official or body, and denying that plaintiffs are entitled to any relief. This clearly makes an issue of all matters in controversy.

The Court upon consideration of the matters hereinabove

mentioned finds and decrees that Section 49-604(b) is in no way unconstitutional nor does it delegate upon or to the Commissioner of Education any absolute power, but that the authority conferred upon the Commissioner by this Section of the Code is circumscribed by the guidelines laid down by the law and also by the rules and regulations adopted by the State Board of Education. The real issue in this cause is whether or not Lincoln County schools are meeting a minimum standard for school plants as laid down by the State Board of Education and whether or not there were any deficiencies existing in the local school system prior to the opening of school in September of 1973. It is clear from the proof and the record in this cause that these deficiencies did exist and that the Commissioner was within his right, and, in fact, it was his statutory duty, to see that the minimum standards were met by the by local authorities. The Court further finds and decrees that the Commissioner has in no way made improper demands or over-extended his authority with reference to the contacts made by him with the Quarterly County Court of Lincoln County and the Lincoln County School Board.

The Court further finds and decrees that the Lincoln County School Board, as was its duty, made investigation as to the deficiencies then existing in its school system, that said School Board hired architects to assist the Board in making plans and cost estimates and these plans were the plans that were adopted by the School Board, and were the basis for the action of the Quarterly County Court in issuing its school bonds, which plans were submitted to and approved by the State authorities and met the minimum standards as prescribed by the State Board of Education.

The Court further finds and decrees that the State Commissioner of Education, the State Board of Education, and the Quarterly County Court of Lincoln County, and the Lincoln County School Board each and all acted in accordance with the authority granted to them and as required by law and the Court finds and decrees that there

was no arbitrary exercise of power, no unlawful use or delegation of power and that the local authorities were at all times at liberty to do whatever they wanted to do so long as they took steps to bring their schools up to meet minimum State requirements.

Under these circumstances, the Court finds and decrees that plaintiffs' suit cannot be maintained, and it is, therefore, ordered, adjudged and decreed by the Court that the plaintiffs' suit be and the same is hereby dismissed in its entirety, to which action of the Court in dismissing plaintiffs' complaint, the plaintiffs except and pray an appeal to the next term of the Court of Appeals sitting in Nashville, which is granted upon plaintiffs making proper bond within the time allowed by law, and otherwise perfecting their appeal.

All costs of this cause will be taxed against plaintiffs, for which execution may issue, if necessary.

ENTER

/s/ John D. Templeton

CHANCELLOR"

III. Assignments of Error

Counsel for plaintiffs has filed fourteen separate assignments of error which it will not be necessary to set forth seriatim.

Said assignments may be summarized as follows:

It is charged that the Chancellor erred in failing to recognize that the County or Local School Board has exclusive power to determine school policy while the Commissioner of Education of Tennessee is an administrative officer whose duty it is to serve the Local School Boards and not to dictate to them.

The plaintiffs earnestly insist that T.C.A. Section 49-201(5) imposes a duty on the County Court to call a referendum on the question of a bond issue for schools, particularly where, as in the case at bar, some four or five

thousand citizens of the County petitioned the Court for such a referendum.

Assignments 4, 5, 6, 7, 8, 9 and 10 complain of the action of the Chancellor in either refusing to admit certain testimony or in disregarding certain testimony and evidence with respect to the building of the comprehensive High School and the abandoning of certain other existing High Schools in the County, and a failure to give credence and weight to the testimony of witnesses with regard to the action of the County Court in voting the bond issue and the influences that were brought to bear on the Court to induce such action.

The remaining assignments complain of the refusal of the Chancellor to allow interrogatories to be taken of a prominent national authority on education regarding the controversy between its finding regarding centralized comprehensive schools as opposed to local community schools and his failure to give due weight to the sentiments of a large number of taxpayers, parents of school-children and the welfare of the children themselves regarding the central issue involved here or the proper authority to be accorded Local School Boards as opposed to dictation by the State Board, and in failing to give due weight to the testimony of expert witnesses concerning the serious controversy in the educational world as to the respective merits of central consolidated schools as opposed to community oriented schools.

IV. - Our Conclusions

We feel it is unnecessary to discuss at any length the questions fully discussed and decided by the Chancellor.

We deem it proper, however, to call atttention to certain facts and decisions bearing on the questions at hand.

Attention is called to the following stipulation which was entered into by counsel for the parties and filed prior to the

hearing below:

"Come the parties by and through their attorneys and agree and stipulate to the following facts:

1. That the Lincoln County Quarterly Court is composed of 32 Magistrates.

2. That at the time of the filing of plaintiffs' suit, Lincoln County was in the process of advertising its $4,000,000.00 school bonds in the Lincoln County News, and in The Bond Buyer, a New York newspaper, with sealed bids to be received on September 17, 1974. The filing of the plaintiffs' suit had the effect among others of halting or enjoining the bond sale until such time as Lincoln County can furnish the prospective bond purchaser with a 'no litigation certificate', stating in effect that no litigation is pending or threatened with reference to the sale of Lincoln County's $4,000,000.00 school bonds.

APPROVED:

/s/ Jack Kershaw
Attorney for Plaintiffs

/s/ Robert W. Simms
Attorney for Lincoln County Defendants

/s/ Richard Lodge
Assistant Attorney General,
Attorney for State Defendants"

Plaintiffs' Motion to Reconsider, filed in the Chancery Court on June 17, 1975, states:

"Plaintiffs would respectfully call the Court's attention to the fact that plaintiffs challenge the right of the County Court to use T.C.A. 49-701 as authority for issuance of bonds; therefore the mere fact that it did cite said statute does not obviate the necessity of considering a subsequent

statute T.C.A. 49-201(5) heretofore overlooked by the Supreme Court of this State."

Section 49-201 is entitled "Duties of Quarterly County Court." Subsection (5) thereunder as follows.

"(5) To submit to the voters of the County at any regular session, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord herewith."

Section 49-701. T.C.A. is the first section in Chapter 7 entitled "BONDS FOR SCHOOL PURPOSES". Said section provides:

"49-701. Issuance by County Courts authorized. — The Counties through their respective Quarterly County Courts are authorized to issue and sell bonds for the purposes and in the manner provided in this chapter."

The succeeding sections in said Chapter set forth certain regulations and proceedings regarding the issuance of bonds for actual school purposes which are not in question in this suit.

Contrary to the insistence of counsel for plaintiffs that T.C.A., Section 49-201(5) has been overlooked by the Courts of Tennessee and not heretofore acted on, we think *State ex rel v. Safley, Chairman, etc., et al,* 172 Tenn. 385 (1937), 112 S.W. 2d 831, deals with the question at hand. In that case a bill by the State of Tennessee, on relation of certain taxpayers, was filed against C. R. Safley, Chairman, and others, to enjoin the issuance of school bonds under a resolution of the County Court. From a decree dismissing the bill, the complainants appealed. In the Opinion by Mr. Justice Chambliss, it is pointed out that the County Court acted under the authority of Chapter 5 of the Code entitled "Bonds for Schoolhouses," and under Title 7 of the Code, entitled "Education".

In the course of the Opinion, the section of the Code being dealt with was quoted, as follows:

"Quarterly County Courts may issue and sell bonds for school buildings, etc. — The Counties through their respective Quarterly County Courts are authorized to issue and sell bonds for the purposes and in the manner hereinafter provided."

This is the language of the present section under consideration, to-wit, Section 49-701.

The Court further quotes what is now Section 49-702, providing that bonds may be issued by the Quarterly County Court by resolution adopted by a majority of the members.

The Opinion continues by stating that, by an amendment to the original bill, the issuance of these bonds was challenged because not authorized by an election of the qualified voters of the County, as provided by another section of the Code. The Court goes on to say that the specific statutory authorization in Chapter 5, hereinabove quoted, prevails over the general requirements of the section calling for a majority vote of the qualified voters of the County and states that the specific authorization constitutes an exception because the special provisions of the Code prevail over the general provision invoked. He then quotes from Section 13 of the Code as it was adopted in 1932, as follows:

"*Conflicts.* — If provisions of different chapters or articles of the Code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article."

The Court, quoting with approval from *Rodgers v. United States,* 185 U.S., 83, 22 S.Ct. 582, and from *Crane v. Reeder,* 22 Mich., 322, said:

" 'Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter

in question, and the other general, which if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict.' "

"Finally, the views indicated are in harmony with our Tennessee cases, and find direct support in the following excerpt from the Opinion of Chief Justice Neil in *Board of Park Commissioners v. Nashville,* 134 Tenn. 612, at page 629, 185 S.W., 694, 698."

The result of the decision of the Court in *Safley* is as stated in Syllabus 4:

"4. Statutes: An act treating a subject in general terms and not expressly contradicting provisions of a special statute should not be considered as intended to affect the more specific provisions of a special statute, unless it is absolutely necessary so as to construe general act to give its words any meaning at all."

We, thus, agree with the Chancellor that the bond issue as authorized by the Quarterly County Court is a valid issue without submission to the voters by referendum.

As to the constitutionality of the statutes involved, we concur in the Chancellor's decree holding said statutes valid.

While this Court is sympathetic with the views held by plaintiffs in this case concerning the desirability of community oriented schools as generally opposed to large consolidated schools that require extensive busing of children for long distances, we are compelled to agree with the Chancellor that, in the case at bar, the relief prayed for by plaintiffs must be denied.

It results that the assignments of error are overruled and the judgment of the Chancellor is affirmed.

AFFIRMED.

/s/ Thos. A. Shriver
THOS. A. SHRIVER
PRESIDING JUDGE

TODD J., CONCURS
DROWOTA, J., CONCURS

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EDWARD MITCHEL, *et al.*,

Petitioner

VS

JUDGE TAYLOR CRAWFORD, *et al.*,

Respondent

FILED
APR. 5, 1976
RAMSEY LEATHERS
CLERK
SUPREME COURT

LINCOLN EQUITY

IN RE: PETITION FOR WRIT OF CERTIORARI OF
EDWARD MITCHEL, ET AL.

Upon consideration of the petition and brief in support thereof of Edward Mitchel, et al., the brief of Judge Taylor Crawford, et al., the opinion of the Court of Appeals and the record in the cause,

Finding no error in the Court of Appeals, the writ is denied at the cost of petitioner.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

EDWARD MITCHEL, *et al.*,

Petitioner

VS

JUDGE TAYLOR CRAWFORD, *et al.*,

Respondent

FILED
APR. 19, 1976
RAMSEY LEATHERS
CLERK
SUPREME COURT

LINCOLN
EQUITY

ORDER

A petition for rehearing was filed, requesting that the Court reconsider the denial of a petition for certiorari.

Upon consideration, the Court finds that the petition to rehear was not well taken and it is accordingly overruled.

PER CURIAM

Henry, J., not participating

IN THE CHANCERY COURT OF GILES COUNTY, TENNESSEE

ALFRED M. STEWART, his minor child JAMES MERIT STEWARD bnf ALFRED M. STEWART, ERMAN HARWELL, his minor children BEVERLY HARWELL, and LORETTA HARWELL bnf ERMAN HARWELL, CHARLES D. STANFORD, GERALD YOUNG, his minor child SHERRY YOUNG bnf GERALD YOUNG, HAROLD DICKY, JIMMIE MYERS, his minor children RICHARD MYERS and DWIGHT MYERS bnf JIMMIE MYERS, JACK WOODARD, his minor children JACK WOODARD, JR., ANNETTE WOODARD and KAREN WOODARD bnf JACK WOODARD, WILLIE T. COLLINS, JR., his minor children DEXTER COLLINS, RANDY COLLINS, AIMEE

COLLINS, SUSAN COLLINS, and TRACY COLLINS bnf WILLIE T. COLLINS, JR., DAVID D. YOUNG, his minor children, TRACY YOUNG, PAUL YOUNG, RICHARD YOUNG, JIMMIE YOUNG, BOBBY YOUNG, and TOMMY YOUNG bnf DAVID D. YOUNG

Plaintiffs

VS.

EARL WAKEFIELD, COUNTY JUDGE OF GILES COUNTY, TENNESSEE, the GILES COUNTY COURT composed of FORREST BATES, HOMER D. BOGGS, ROBERT L. BIRDSONG, TILLMAN DAWVES, ROGER CHILDERS, HORACE R. DURHAM, CHARLES BROWN, BERTRAND HANAH, LACEY B. PHILLIPS, MARK DUNAVANT, WINFRED HELTON, GARDNER HUBBELL, WILLIAM E. REEVES, ROBERT ROBINSON, CHARLES H. BRASHEARS, SOLON DAUGHTRY, JOHN L. TUCKER, CHARLES VANZANT III, BILL CHEATHAM, JAMES BROWN, MRS. VIVIAN LOCKETT, TILLMAN CARVEL, HUGH HOSKINS, DAVID E. McPETERS, and CLIFFORD RUSSELL; the BOARD of EDUCATION of GILES COUNTY composed of PETE (WILLIAM W.) BRITTON, MRS. THEODORE LIPMAN, THOMAS W. MITCHELL, HOWARD C. VAYSINGER, STEVE SANDERS, THOMAS SMITH, and DON TILLMAN; the SUPERINTENDANT of SCHOOLS of GILES COUNTY, J. MARLIN GOODMAN; the BOARD of EDUCATION of TENNESSEE composed of NOBEL C. CAUDILL, THOMAS E. GERAGHTY, H. LYNN GREER, JR., JAMES W. HAWKINS, HUGH T. McDADE, ANDREW J. PAYNE, JR., MRS. C. LENTZ STEVENS, F. THORTON STRANG, MRS. DORIS B. TANNER, STEPHEN DENNIS, HAL HENARD, MORRIS L. SIMON, and GEORGE WAYNE BROWN; SAM H. IMGRAM, COMMISSIONER OF EDUCATION and CHAIRMAN OF THE BOARD; RAY BLANTON, GOVERNOR of TENNESSEE; MILTON P. RICE, ATTORNEY GENERAL of TENNESSEE; and J.C. BRADFORD COMPANY and GEORGIA TRUST COMPANY BROKERS AND FISCAL AGENTS for GILES COUNTY.

Defendants

COMPLAINT

The Plaintiffs respectfully show to the Court:

I.

That the Plaintiffs are citizens, property owners, taxpayers, and parents; the minor children are attending or will be attending the public schools of Giles County, Tennessee. They bring this suit for themselves, and other similarly situated, as typical representatives of a class that have common interests with questions of fact and law common to the class, and are so numerous as to make it impracticable to bring them before this Court individually. Plaintiffs say that they will fairly and adequately protect the interests of the class. As some indication of the concern among residents of Giles County of the matters herein, Plaintiffs aver that several thousand citizens have signed and presented petitions at various times to the County Court of Giles County on the school question presented herein.

Plaintiffs, as *taxpayers* and *landowners*, state that they have special interest in this suit in that it involves the closing of valuable school buildings, and the building of others and that the result will directly and adversely affect their tax rates, and tax liability, without similarly affecting other taxpayers, and particularly without similarly affecting persons who do not own property within the district.

Plaintiffs as *parents* of children attending the public schools of Lincoln County have also a special interest in a most valuable interest, their children, who are subject to imposition of danger, loss of time, and threats to health and well-being, by the acts of the Court and the School Board which combine to close certain neighborhood schools, and subject children to long and hazardous bus trips, and the parents to additional expenses. These plaintiffs as parents aver that they have an interest different from that of the public generally in that the public generally are not all parents, nor parents of school children.

II.

The defendant, Sam H. Ingram, is Commissioner of Education of Tennessee and Chairman of the State Board of Education, and is made a defendant herein his official capacity. The named members of the Board of Education of Tennessee are named defendants in their official capacity; the Governor of Tennessee, Ray Blanton, is named as an ex-officio member of the Board.

The defendant, Milton P. Rice, Attorney General and Reporter for the State of Tennessee is made a party defendant here, pursuant to T.C.A. Section 23-1107.

The defendant, Earl Wakefield, County Judge of Giles County, Tennessee, and the members of the Court are made defendants in their capacities as members of the Legislative body appropriating certain funds for the public school system of Lincoln County, Tennessee.

The named members of the School Board of Lincoln County are named as defendants in their official capacities as members of that body.

The J. C. Bradford Company and Georgia Trust Co. are named as defendants as the fiscal agents of Lincoln County and agents for floating a proposed bond issue, the legality of which is questioned herein.

III.

This action is brought under authority of T.C.A. 23-1101-2-3 et seq and Rule 57 of the Tennessee Rules of Court.

Further, Plaintiffs assert, under authority of Rule 22 supra, their fitness to bring this suit as a class, since they fill all requirements of Rule 23-01-02.

IV.

The history of events culminating in this lawsuit go back to 1969 when the then Commissioner of Education demanded

that the Giles County Board of Education recommend to the Giles County Court a one-consolidated school plan and he demanded that the County Court promptly fund that plan; if these bodies did not comply, he would cut off state funds due the county. Funds were cut off October 24, 1969, and the schools were closed until November 13, 1969, upon assurances from fourteen members of the court that they would vote for a consolidated school as demanded by the Commissioner.

A group of taxpayers brought suit (White vs. Warf); in consequence the bond issue for the consolidated school was held up.

The suit was dismissed on the grounds that taxpayers lacked standing to sue.

A new group of taxpayers and parents (Young vs. Warf) brought suit, and the bond issue was held up again. This suit was also dismissed on the grounds that parents as well as taxpayers lacked standing.

It was the contention of both these groups that the Education Act under which the Commissioner operated was unconstitutional and that he administered his office in an unconstitutional manner; that the bond issue was improperly authorized and the voters of Giles County denied their right to referendum on the bond issue.

These questions have never been considered or answered on their merits for the citizens of Giles County.

Since the dismissal of Young vs. Warf, the Supreme Court of Tennessee has ordered that a similar but different case be heard on its merits to satisfy questions put by citizens of Lincoln County, Tennessee (Mitchel vs. Carmichael). That case has been heard and is now on appeal.

The citizens of Giles County, Plaintiffs, herein assert that they, like the citizens of Lincoln County, also have a right to have the facts and the merits of their school situations heard and considered and that they have their day in court.

Copies of relevant correspondance between the various commissioners and the officials of Giles County and the minutes of the Quarterly Court of Giles County and of the Board of Education of Giles County are hereby made exhibits (A) to this Complaint and will be filed as soon as they can be assembled.

V.

Plaintiffs would show to the Court that under authority of T.C.A. Sec. 49-108, the State Board of Education and the Commissioner of Education, adopted "Rules, Regulations and Minimum Standards" and published same in pamphlet form. The statute is quoted in full:

> **49-108.** CLASSIFICATION OF SCHOOLS—CURRICULA. - It shall be the duty of the state board of education to prescribe rules and regulations for the approval and classification of all public schools, grades one (1) through twelve, (12), or any combination of these grades; to make regulations for their government; to prescribe curricula and to approve courses of study adopted by local county, city and special school district boards of education upon the recommendation of the superintendent of schools, provided, that such courses of study shall be in accord with the regulations of the state board of education governing the approval of public schools; and, provided further, that the curriculum and course of study of each public school shall include adequate provision for the growth of its pupils in the skills basic to citizenship in American democracy. (Acts 1951, ch. 119, 1 (Williams, 2316a.)

The Rules and Regulations are attached and made a part hereof but need not be copied for issuance of process, (Ex. "B"). They set out stringent and detailed requirements under the general headings of:

I. Administrative Rules and Regulations

II. Minimum Requirements for the Approval of Public Schools

III. Minimum Standards for School Attendance Centers, School Sites, Construction of School Buildings, Major Repairs, of School Buildings of a Capital Outlay Nature, and Equipment of School Buildings.

IV. Pupil Transportation and Minimum Standards for School Buses.

V. The National School Lunch, Special Milk, School Breakfast and other Food Service Programs in the Public Schools of Tennessee - Grades 1 through 12.

At the end of Part I, "Administrative Rules and Regulations", on page 29, after all the rules in that section have been set out, a general "waiver" is provided as follows:

"The State Commissioner of Education is authorized to grant waivers of any of these rules and regulations".

On page 58, a similar blanket power of waiver is granted in regard to Section II, "Minimum Requirements for the Approval of Public Schools".

On page 69, at the end of Section III (the section on school buildings) a somewhat more restrictive waiver power is granted in that there the commissioner is required to use his discretion before acting. The precise language is:

"The State Commissioner of Education is hereby authorized to grant waivers of any of these standards if in his discretion it seems advisable because of factors which might improve the location or facilities for the total school attendance centers".

For Sections IV and V no power of Waiver is granted or assumed.

VI.

Plaintiffs would show that under authority of T.C.A.

Section 49-604, (B) 1,2, and 3, (enacted in 1972), the Commissioner of Education is given power "in his discretion", "to enforce" the Rules and Regulations which he and his board created, supra under T.C.A. 49-108.

T.C.A. 49-604 (B) 1, 2, and *3* provide:

49-604. ANNUAL DISTRIBUTION OF MINIMUM FOUNDATION SCHOOL PROGRAM FUNDS — TIME — REQUIREMENTS.

. . B. In order for any public school system to receive the state funds appropriated for the minimum foundation school program as determined in 49-603, such system shall meet the following conditions and requirements. In order to enforce the same, the state commissioner of education may, in his discretion, withhold a portion or all of the state school funds which the system is otherwise eligible to receive.

1. Every school system shall meet the requirements of state law as to the operation of such system.

2. Every school system shall meet the rules, regulations, and minimum standards established by the state board of education for the location, construction and operation of schools.

3. Every school in every school system shall meet the requirements of the state board of education for an approved school. (Acts 1925, ch. 115, 17; Shan. Supp., S 1487a124; Code 1932, 2416; Acts 1972 (Adj. S.), Ch 693, 6.)

VII.

T.C.A. 49-602 E provides:

E. *Capital Outlay*

There shall be included in the minimum foundation school program an amount to be used exclusively for the purpose of capital outlay, including the purchase and improvement of sites, the construction of buildings, the remodeling of renovation of buildings, the purchase

of equipment for schools and school buildings, and the purchase of pupil transportation equipment, for the public schools of this state, which sum shall be distributed by the state commissioner of education as provided in this chapter among the public school systems of the state upon the conditions hereinafter prescribed in this subsection. The amounts of funds so distributed to each school system under the provisions of this subsection may be used in the discretion of the local board of education for the payment of the principal and interest on any bonds of original issue or other forms of legal indebtedness of original issue, issued by the system for school capital outlay purposes since July 1, 1947, including school bonds refunding school capital outlay bonds of original issue since July 1, 1947.

AND E 9 and 10 provide:

9. The state funds for the public schools for capital outlay purposes distributed under the provisions of this Chapter shall be obligated and expended only according to a plan (A) recommended by the local superintendent of schools and approved by the local board of education, (b) filed with the state commissioner of education on or before August 1 of the current school year, on forms prescribed by him, and (c) approved by the state commissioner of education. However, such plan may be amended during the school year to meet changing conditions or emergencies, but such amendment shall be filed with, and approved by, the state commissioner of education before any funds referred to hereinabove in this paragraph shall be obligated or expended for the purpose of the amendment.

10. The state board of education shall establish minimum standards for school sites, including locations, school attendance centers, the construction of buildings for school purposes, the remodeling or renovation of

buildings for school purposes of a capital outlay nature, and for equipment for buildings for school purposes. No local board of education shall obligate or expend any state or local school funds for any project of a capital outlay nature which does not conform to the standards adopted by the state board of education as authorized in this paragraph.

VIII.

Plaintiffs would show, that in spite of language in the statutes above quoted (which seem to intend that the local boards of education shall have power and discretion) actually, as a matter of practice, the Giles County School Board has been deprived of its discretion by the weight, power, and influence of the Commissioner of Education who has illegally used his power to deprive the County School Board and the County Court of the right of discretion, belonging to those bodies.*

**Schecter Poultry* v. *United States* 295 U.S. 495, 44 S. Ct. 837, 79 L. Ed. 1570 (1935) holds:

"Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation . . . of industry."

"It supplies (Section 3 of the Recovery Act) no standards . . . Instead it authorizes the making of codes to prescribe theirs. The code-making authority thus sought to be conferred is an unconstitutional delegation of legislative power."

Malone v. *Williams* 118 T. 390 holds that where an official had power to decide, whether or not ". . . in his opinion a nuisance exists on public or private property" and then may proceed to . . . "remove such nuisance" that this was "arbitrary power" and that "no man is wise enough or good enough to be vested with arbitrary power over the property of his fellow citizens . . .

provisions which give rise to these powers are in violation of Section 8, Article I of our State Constitution, which provides "that no man shall be taken or imprisioned, or disseized of his free hold liberties or privileges outlawed or exiled in any manner destroyed or deprived of his life, liberty, or property but by the judgment of his peers or the law of the land." They (the provisions) are, therefore, void." (pp. 417-18)

IX.

The statutes controlling bond issues for schools in Tennessee enacted in sequence are:

T.C.A. 49-701 (1911). ISSUANCE BY COUNTY COURTS AUTHORIZED. The counties through their respective quarterly county courts are authorized to issue and sell bonds for the purposes and in the manner provided in this chapter.

T.C.A. 49-702 (1911). RESOLUTION FOR ISSUANCE-MAXIMUM AMOUNT OUTSTANDING. Said bonds may be issued by the quarterly county court of any county by resolution adopted by a majority of the members of said quarterly county court at any regular, special or adjourned meeting thereof; provided, however, that no county shall issue bonds hereunder in an amount which, together with all other bonds of said county then outstanding which were issued under authority of this chapter, will exceed ten per cent (10%) of the assessed valuable of the taxable property within such county if prior to the sale thereof, approval thereof shall be obtained from the commissioner of education of the state of Tennessee. Such approval shall be in writing and shall be recorded in the minutes of the quarterly county court of the county issuing such bonds.

T.C.A. 5-1001 (1923). POPULAR VOTE TO AUTHORIZE BONDS. EXCEPTIONS. - Any bonds authorized to be issued by any of the counties, upon the

faith and credit of such county, for public purposes, shall only be upon an election to be first held by the qualified voters of such county and the assent of a majority of the votes cast in said election; provided, that nothing in this section shall be construed as applicable to renewal or refunding bonds; provided, further, that nothing in this section shall be construed as applicable to the issuance of bonds for the building of a courthouse in any county in which the courthouse has been destroyed. Nothing in this section shall interfere with or affect any present enabling act for state and federal aid for the construction of state and federal roads.

T.C.A. 49-201 (5) (1925). DUTIES OF QUARTERLY COUNTY COURT

(5) To submit to the voters of the county, at any regular session, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority case in said election, to issue said bonds in accord therewith.

Plaintiffs aver upon a plain reading of the above statutes, culminating in T.C.A. 49-201, that the County Court of Lincoln County has a duty, upon receipt of an independently conceived plan for school expenditures from the County Board of Education, to submit any consequent bond issue to a referendum of the people; this the Court has failed to do and therefore, acted illegally in authorizing the current School Bond Issue. Plaintiffs aver that the office of the Board of Education has consistently discouraged and illegally chilled the right of referendum to the people. Attached hereto and made a part hereof are three affidavits which substaniate this averment.

X.

There is a real controversy between the parties in that the State defends the constitutionality of T.C.A. 49-604 (B) 1,2,

and 3; T.C.A. 49-602 (E) 9 and 10, the Education Act of 1969, as reenacted and its Section 21 in particular, and the complainants attack these measures. The Commissioner of Education defends his exercise of power, and his manner in so doing, in withholding funds, as constitutional, and plaintiffs contend to the contrary.

Plaintiffs aver that they have a constitutional and statutory right to a referendum on the funding of a new school system; the defendants deny this right.

Plaintiffs assert that their constitutional rights listed in Paragraph XI (following) have been violated: defendants deny this.

XI

Plaintiffs aver that as parents and taxpayers they are, in summary, injured in the following respects:

The Public Education Act of 1969 as amended and/or reenacted is unconstitutional in that it grants unfettered and undelegable powers to the Commissioner of Education, and/or it is unconstitutional as administered; further plaintiffs are denied their right to a referendum:

All in violation of Article I, Sections 1,2,5,8 and 21; Article II, Sections 1, 2, 3, (See footnote 7), 17 and 29 (See footnotes 6 and 9) and Article XI, Sections 16 and 17 of the Constitution of Tennessee:

ARTICLE I

Section 1. ALL POWER INHERENT IN THE PEOPLE. GOVERNMENT UNDER THEIR CONTROL. - That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

Section 2. DOCTRINE OF NONRESISTANCE CONDEMNED. That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Section 5. ELECTIONS TO BE FREE AND EQUAL. RIGHT OF SUFFRAGE. - The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Section 8. NO MAN TO BE DISTURBED BUT BY LAW. - That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Section 21. NO MAN'S SERVICES OR PROPERTY TAKEN WITHOUT CONSENT OR COMPENSATION. That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

ARTICLE II

Section 1. DIVISION OF POWERS. The power of the Government shall be divided into three distinct departments; the Legislative, Executive, and Judicial.

Section 2. LIMITATION OF POWERS. - No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Section 3. LEGISLATIVE AUTHORITY - TERM OF OFFICE. The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Section 17. ORIGIN AND FRAME OF BILLS. - Bills may originate in either House; but may be amended, altered or rejected by the other. *No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended.*

Section 29. COUNTIES AND TOWNS - POWER TO TAX - CREDIT. The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no County, City or Town shall be given or loaned to or in aid of *any person,* company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election.

ARTICLE XI

Section 16. BILL OF RIGHTS TO REMAIN INVIOLATE. - The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill

of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.

Section 17. COUNTY OFFICES. - No County office created by the Legislature shall be filled otherwise than by the people or the County Court.

XII

PREMISES CONSIDERED, PLAINTIFFS PRAY:

1. That proper process issue and be served on defendants requiring them to appear and answer this Bill, but not under oath, their oath being expressly waived.

2. That this action be maintained as a class action.

3. That the Court herein determine the issues presented by this action under the Declaratory Judgment Act and that the Court declare those portions of our current Public Education Act and the Rules and Regulations deriving therefrom which grant undelegable and unfettered powers, to be unconstitutional, on their faces and as applied.

4. That after a hearing the County Judge of Giles County and the County Court of Giles County and its members and the fiscal agent of Giles County be enjoined from any and all acts in furtherance of the bond issue in question.

5. That after a hearing the Commissioner of Education be enjoined from continuing the exercise of unconstitutional powers or the unconstitutional and illegal exercise of any powers as complained of herein.

6. That after a hearing the Quarterly Court be enjoined from denying to the people of Giles County a referendum on the bond issue in question.

7. That, as a result of this suit, should the Commissioner of Education attempt to exercise the powers here challenged and proceed to cut off school funds from Giles County, he be enjoined from withholding payment of funds to said county pending the outcome of this litigation.

8. That the plaintiffs be awarded such other, further and general relief as may be deemed meet and proper.

Solicitor for Plaintiffs

Jack Kershaw
3710 Lealand Lane
Nashville, Tennessee 37204

I certify that I have on this 26th day of January, 1976, mailed copies of this Complaint of Hon. Milton P. Rice, Attorney General, Supreme Court Building, Nashville, Tennessee; Hon. County Attorney for Giles County, Giles County Courthouse, Pulaski, Tennessee.

JACK KERSHAW

AFFIDAVIT

Upon being first duly sworn I, Landon G. Holt, make oath and say:

As an interested parent I attended a meeting between the Commissioner of Education, Benjamin Carmichael, the Board of Education of Giles County and the Education Committee of the County Court of Giles County. At that meeting he was asked how he felt about submitting a school plan to people to vote on. He replied that he would not like to see the people vote "under pressure." Asked what he meant by "pressure," he replied that if the people voted contrary to a state approved plan, he would still have to cut off the state funds.

Further affiant saith not.

/s/ Landon H. Holt
Landon H. Holt

STATE OF TENNESSEE

Personally appeared before me, Charlie M. McKnight a Notary Public in and for said County and State, the within named Landon H. Holt, the affiant, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and official seal at Pulaski, Tennessee, this 25th day of January, 1976.

/s/ Charlie M. McKnight
Notary Public

Commission Expires April 11, 1977.

AFFIDAVIT

Upon being first duly sworn I, Charles Vanzant III, a citizen and taxpayer of Giles County Tennessee do make oath and say:

That as a member of the Giles County Court I met with others and the Commissioner of the State Board of Education and that on that occasion, the Commissioner conveyed to me the impression that he could exercise or withhold his waiver powers on school deficiencies, but that in any event the waivers could be granted for only two years and that therefore since the upcoming primary elections were too near in time to meet the required waiting period before submission to referendum, it would not be possible to hold a referendum before he would cut off state funds; and furthermore gave the impression that only the implementation and funding of a school improvement program by local officials to remove the waivers would prevent fund cutoff. The proposal for a referendum was deemed not feasible by the people there at that meeting because the commissioner would cut off funds if the referendum passed or failed as the

referendum would not legally establish a school improvement program and fund it. His waiving of regulations was attendent upon our (the Quarterly Court) funding and the School Board implementing a program of school improvement required by the commissioner.

Further affiant saith not.

/s/ Charles Vanzant III
CHARLES VANZANT III

STATE OF TENNESSEE

Personally appeared before me, Charles Vanzant III a Notary Public in and for said County and State, the within named Charles Vanzant III, the affiant, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and official seal at Pulaski, Tennessee, this 26th day of January, 1976.

/s/ Mary Anne Bass
Notary Public

Commission Expires October 14, 1978.

AFFIDAVIT

Upon being first duly sworn I, Gerald S. Young, make oath and say:

During the meeting with Commissioner of Education, Benjamin Carmichael, the Giles County Board, the Education Committee of the Giles County Quarterly Court and several other citizens from Giles County, concerning the plan of eight high schools for Giles County, many things were discussed as to how we might retain our community

schools by upgrading and including the restoration of the high school to Minor Hill. During this meeting, Commissioner Carmichael was asked by one of the court members what he thought about them coming back to Giles County and putting a certain school plan of upgrading but non-consolidation before the people of the county in referendum. (I think that it was the plan of upgrading the seven existing high schools and the restoration of Minor Hill High School but am not absolutely positive.) However, I am absolutely positive concerning his reply to the question. In my words he said: It would be unfair to the people of Giles County to have to vote under this kind of pressure and that he felt it would be better if no referendum was held. When questioned as to what kind of pressure he referred to, he replied that if the people voted unwisely or contrary to his will or the will of the state, he would be forced to withhold the state funds.

Further affiant saith not.

/s/ Gerald S. Young
GERALD S. YOUNG

STATE OF TENNESSEE

Personally appeared before me, Charlie M. McKnight a Notary Public in and for said County and State, the within named Gerald S. Young, the affiant, with whom I am personally acquainted, and who acknowledge that he executed the within instrument for the purposes therein contained.

Witness my hand and official seal at Pulaski, Tennessee, this 25th day of January, 1976.

/s/ Charlie M. McKnight
Notary Public

Commission Expires April 11, 1977.

IN THE CHANCERY COURT OF GILES COUNTY, TENNESSEE

ALFRED M. STEWART, *et al*

VS.

EARL WAKEFIELD, COUNTY JUDGE, *et al*

RULE NO. 3536

FILED
FEB. 10, 1976
JESSE B. McNEESE
Clerk & Master

ORDER

This cause came on this the 6th day of February, 1976, to be heard before the Honorable Joe M. Ingram, Judge Part I of the Circuit Court of Giles County, Tennessee, while sitting and holding the Chancery Court for this State and County at Pulaski, upon the original complaint and amendment thereof of the Plaintiffs, the joint Motion to Dismiss of all of the Defendants, together with the exhibits attached thereto, statement and argument of counsel for all parties, and upon the entire record in this cause; from all of which it appears to the Court as follows:

1.

The Court finds that the Plaintiffs do not maintain such standing or have such special status or interest to sue so as to allow them to maintain this suit, notwithstanding the conclusory allegations of illegality.

2.

The Court specifically finds that in this case all of the matters and issues have heretofore been adjudicated in the cases of Young, et al, vs. Warf, et al, Davidson Equity No. A-1536 and White, et al, vs. Warf, et al, Davidson Equity No. 93495 and are res judicate.

3.

The Court specifically finds that in the recent opinion of the Court of Appeals in the case of Mitchell, et al vs. Crawford, et al, Lincoln Equity No. 5351, which is on all

fours of the factual situtation and the law that applies thereto, the Court of Appeals decided the same contrary to the insistence of the Plaintiffs.

4.

The Court specifically finds that as set out in ground #5 of the Motion to Dismiss that the only reason for the filing of the Complaint is to delay and obstruct the County Defendants from their lawful purpose of implementing a school reorganization plan for Giles County, Tennessee, which will meet the minimum State's requirements for the public education and the health and safety of the pupils attending the public schools of Giles County. The insistence of the Defendants in their Motion to Dismiss is specifically sustained by this Court and the Court further finds as set out in the opinion in the case of Young vs. Warf wherein the Court observed in that case, "That the real purpose of the litigation is to prevent the construction of a consolidated high school in Giles County contrary to the opinions of this Court in *White* that it can be built legally." The Court feels that this is true in this case and as suggested in the *Young* opinion, "That the Courts cannot be used oppressively to gain the ends the litigants and counsel have in mind contrary to the judgment of the Courts and if the Courts are so used, they are not defenseless."

5.

The Court specifically finds from the record in this cause and from the statements as made by counsel in oral argument that the litigation here follows the same pattern as in previous similar and identical litigation filed by the Plaintiffs and Plaintiffs' counsel i.e. that suit was filed on the eve of or near the date of the sale of the school bonds and that the "filing of the Plaintiffs' suit had the effect, among others, of halting or enjoining the bond sale until such time as the . . . . County can furnish the prospective bond purchasers with a

no litigation certificate stating in effect that no litigation is pending or threatening with reference to the sale of .... school bonds" further, upon inquiry as made by the Court of counsel during argument as to the reason for the long delay in the opinion of the *White* case, it developed that Plaintiffs' counsel failed to file a proper appeal bond and the appeal was subsequently dismissed. Thereafter, Plaintiffs' counsel notified Defendants' counsel by letter that he intended to file a petition for Writ of Error within the time as provided by law which, although the suit had been dismissed, would prevent Defendants' counsel from furnishing the prospective bond purchasers with a no litigation pending or threatening certificate. That the Plaintiffs' counsel waited for approximately seven (7) months before petitioning for said Writ of Error.

Therefore, by reason of the above, the Court finds that the inescapable conclusion is the same conclusion as reached by the Appellate Court in the *Young* case and that is the only possible purpose of the present suit being to delay the construction of the consolidated high schools implementing a school reorganization plan for Giles County contrary to the opinion of this Court that it is oppressive and this Court will likewise not welcome another like it.

WHEREFORE, by reason of the above, it is therefore, ORDERED, ADJUDGED and DECREED by the Court that Defendants' Motion to Dismiss is sustained on all grounds with exception of ground #2, and this case is accordingly dismissed at the Plaintiffs' cost.

/s/ Joe M. Ingram

Joe M. Ingram, Judge Part I

IN THE SUPREME COURT OF TENNESSEE

EDWARD MITCHEL *Et Al*

VS.

BENJAMIN E. CARMICHAEL *Et Al*

STEWART *Et Al*

VS.

WAKEFIELD *Et Al*

EDWARD MITCHEL *Et Al*

VS.

TAYLOR CRAWFORD *Et Al*

FILED
MAR 29, 1976
RAMSEY LEATHERS
CLERK
SUPREME COURT

DAVIDSON EQUITY

GILES EQUITY

LINCOLN EQUITY

MOTION

Come the appellants herein and move that Mr. Justice Henry recuse himself from any hearings or consideration of these cases for the reason that he was special counsel representing Giles County in *Young* vs. *Warf*, which case defendants assert to be dispositive of the instant case.

Respectfully submitted,

/s/ Jack Kershaw

Jack Kershaw
Solicitor for Appellants

Copies have been delivered to opposing counsel.

/s/ Jack Kershaw

Jack Kershaw

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

For publication

ALFRED M. STEWART, *Et Al.*,

Appellants,

VS.

EARL WAKEFIELD, *Et Al.*,

Appellees.

FILED
APRIL 15, 1976
RAMSEY LEATHERS
CLERK
SUPREME COURT

Giles Equity
HON. Joe M. Ingram,
Chancellor

For Appellants:

Jack Kershaw
Nashville, Tennessee

For Appellees:

C. C. Lee
Pulaski, Tennessee

C. Hayes Cooney
Chief Deputy Attorney General
Nashville, Tennessee

Of Counsel:

R. A. Ashley, Jr.
Attorney General
Nashville, Tennessee

OPINION

This is the fourth action instituted by citizens, property owners, taxpayers, parents and children in Giles County, attempting to block a public school bond issue authorized pursuant to T.C.A. §§ 49-701 et seq. In this, as in the previous suits, it is insisted that the Quarterly County Court may not issue bonds such as those in question without a referendum.

This contention has been repeatedly rejected by this Court. In the case of *Wilds v. Coggins,* 496 S.W.2d 460

(Tenn. 1973), the exact contentions made by the plaintiffs in these suits were rejected on their merits. They had also been rejected in the case of *State v. Safley,* 172 Tenn. 385, 112 S.W.2d 831 (1938). See also *Crewse v. Beeler,* 186 Tenn. 475, 212 S.W.2d 39 (1948); *Southern v. Beeler,* 183 Tenn. 272, 283, 195 S.W.2d 857 (1946).

The rule in these cases was followed in the case of *Mitchell v. Taylor,* Lincoln Equity, in an opinion issued by the Court of Appeals, Middle Section, on January 30, 1976, petition for certiorari in which was denied by this Court on April 1, 1976.

This issue, therefore, needs no further consideration, and the repeated attempts by the appellants to delay the public school bond issue here in question on that ground have become harassing and oppressive to the public officials involved to the extent that intervention by this Court has become imperative.

In two previous opinions issued by this Court, involving the construction of a high school building and public bond issues for that purpose, persons occupying the same status and classes as appellants have been held to be without standing to raise any of the other issues involved as to the local officials, and their standing to sue the State officials involved is governed by the decision of this Court in the case of *Sanders v. Carmichael,* 527 S.W.2d 92 (Tenn. 1975).

It is acknowledged in the complaint filed by appellants that the effect of their previous suits has been to delay public bond issues, and no other purpose or reason for the filing of the present suit can be conceived, other than to continue to delay and harass public officials in the consummation of a duly authorized school bond issue.

In the case of *Mitchell v. Carmichael,* 522 S.W.2d 869 (Tenn. 1975), this Court warned that it would not permit the legal processes of this State to be used for the purposes of harassment or delay. A similar warning had been contained in one of the earlier unpublished opinions of this court on the

same subject, involving the same attorney and some of the very individuals who are appellants in the present case.

The trial court sustained a motion to dismiss by both the State and local officials for lack of standing, and we are of the opinion that his decision was soundly based not only upon that ground, but upon failure of the complaint to state a claim for which relief could be granted, particularly insofar as the referendum issue is concerned, that issue having been so thoroughly disposed of on repeated occasions by this Court.

The judgment of the trial court is accordingly in all things affirmed, at the cost of appellants.

In addition, appellants, and all persons acting in a concert or privity with them, are enjoined from instituting any further litigation in the courts of this State questioning or attempting to challenge the validity of the bond issue here in question, and the cause will be remanded to the Chancery Court of Giles County for entry of and enforcement of a decree of injunction in accordance with this opinion.

/s/ William J. Harbison
William J. Harbison, Justice

Fones, C.J., Cooper and
Brock, JJ., concur.
Henry, J., not participating.

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

ALFRED M. STEWART, *et al.*,
Appellants,
Vs.
EARL WAKEFIELD, *et al.*,
Appellees
} Giles Equity

PETITION TO REHEAR

Come the Appellants herein and petition this Honorable Court to reconsider its Opinion entered herein on April 15, 1976, for the following reasons.

I.

The Court in its Opinion cited a number of cases in support of its decision to the effect that the Court has "repeatedly" considered the question of referendum presented herein by Appellants:

Wilds v. Coggins, 496 S.W. 2d 460 (Tenn. 1973)
State v. Safley, 192 Tenn. 385, 112 S.W. 2d 831 (1938)
Crewse v. Beeler, 186 Tenn. 475, 212 S.W. 2d 39 (1948)
Southern v. Beeler, 183 Tenn. 272, 283, 195 S.W. 2d 857 (1946)

None of these authorities, cited by the Court, are recognized by Shephards Citations as dealing with the meaning of the statute in question, T.C.A. 49-201.

Appellants ask for an interpretation of T.C.A. 49-201; not T.C.A. 5-1001.

The cases cited by this learned Court (supra) do not mention or discuss T.C.A. 49-201; they do discuss T.C.A. 5-1001.

Appellants would most respectfully point out that T.C.A. 5-1001 is not T.C.A. 49-201. The language, intent, and powers granted, and the specific subject matter, are *different*.

Shephards Citations *does* list a number of cases wherein T.C.A. 49-201 *has* been interpreted. The statute has nine subsections. Some of the cases, cited by Shephards, consider subsections which are not in controversy here. But *Lamb vs. State* 338 SW2 584, 207 T 162, does deal with the second clause of the subsection in question here (5), and states that: "The statute provides that the duties of the Quarterly Court *shall be:*

> (5; To submit to the voters of the county, at any regular sessions, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, *upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.*" (Emphasis supplied by Court.)

The second clause was underlined by the Court because the issue in that case was whether or not the County Court should be compelled by mandamus to issue bonds after an affirmative vote on the question by the voters.

This Court's description of T.C.A. 49-201 is interesting:

> "In the instant case we can not escape the fact that the statute hereinabove quoted (49-201) *plainly prescribes* a *specific* duty or act on the part of the County Court to be performed in that it is said *(there is no ambiquity in the statute at all)* that when a referendum has been had and the vote is in the affirmative then it becomes the duty, and is the duty of the County Court to issue said bonds in accord therewith." (Emphasis supplied.)

This Honorable Court then finally concluded that "*shall*" is mandatory language and affirmed the issuance of a mandamus.

None of the cases cited as authority by this Honorable Court in its Opinion of April 15, 1976, is recognized by the Shepherd Citators as having anything to do with the statute which petitioners have sought to have construed, and which this Court says it has construed in these cases. Counsel has also read these cases and has been unable to find references to the statute on which the Plaintiffs rely.

Counsel humbly recognizes that he is a mere advocate before this Honorable Court and does not enjoy the position of impartiality which this Honorable Court of course has. Counsel believes, however, that because the Court is an impartial body that it would be proper if its decision in this matter were further discussed and reasoned so that the conclusion reached, whatever it may be, will bear the scrutiny of ordinary legal analysis and so be understandable to citizens and lawyers and recorders of precedent such as the Shephard Citators. In *Joint Anti-Fascist Refugee Committee vs. McGrath* 341 US 123, the United States Supreme Court said:

> "An appropriate governmental 'determination' must be the result of the process of reasoning. It can not be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination'. It is implicit in a government of laws and not of men (341 US at 136)."

On the same subject, Justice Marshall said in relation to the proper performance of the judicial function in *Osborn v. Bank of the United States,* 9 Wheat. 738:

> "Judical power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can do nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of

the legislature; or, in other words, to the will of law." (9 Wheat . . , at 866).

In the instant case, this Honorable Court and the Chancellor has used the "Judicial Power" condemned in *Osborn, supra*. i.e. we have opinion without rationale.

II.

Appellants also seek a rehearing on the issue of standing. The authorities supporting the standing of taxpayers and parents and children to sue the Commissioner of Education, the State Board, the County Board, and the County Court are not discussed in the Opinion.

A new authority, *Sanders vs. Carmichael* 527 SW² 92 (1975), is cited as sole authority for denying standing to Appellants.

In *Sanders*, a school teacher was not accorded standing to sue the Commissioner of Education on a *contract* issue involving the Tenure Act. Again, the impartiality of this high court is invoked to clarify its reasoning:

Because a school teacher can not sue the Commissioner of Education on a contract matter which she has with the School Board, when the Commissioner is not a party to the contract, does this mean that taxpayers or parents or children can not have their day in court and sue the Commissioner of Education in an effort to ascertain, under the declaratory judgment act, whether or not the Commissioner is acting unconstitutionally or is acting under unconstitutional statutes? Is this the precedent being established here? Does *Sanders* strike down all the precedent which allowed citizens of Lincoln County to bring suit against the Commissioner of Education and others? Is the Commissioner of Education now immune from suits by parents and taxpayers of Tennessee?

III.

The Court's Opinion mentions at line 5, page 2, that the

Complainant-Appellants are aware that the effect of this and other suits (not "their" suits as stated by the Opinion) has been to delay public bond issues, and ". .that no other purpose or reason for the filing of the present suit can be conceived." Surely this must be terminological inadvertance. The purpose does not have to be "conceived" or imagined; it is plainly stated: Plaintiffs pray that the actions of certain officials under certain statutes and/or the statutes be declared unconstitutional. Delay has nothing to do with it. And, it is elementary that "effect" is not, by any logical process, necessarily at all connected with "intent."

IV.

Appellants seek a referendum under T.C.A. 49-201. They also seek it under the Constitution of Tennessee, Article II, Section 29, which states in part ". . .that the credit of no County shall be given or loaned to or in aid of *any person* . . .except upon an election to be first held by the qualified voters of such county . . . and the assent of ¾ of the votes cast at said election."

Appellants assert that "any person" was meant to include the Commissioner of Education, and that for him to seek to force a bond issue in the aid of himself and his bureau without a referendum is unconstitutional.

This Honorable Court has not considered Appellants' question under this constitutional provision.

V.

In the first paragraph of its Opinion, this Honorable Court mistakenly asserts that, "this is the fourth action instituted by citizens, property owners, taxpayers, parents, and children in Giles County . . . ."

There have been three cases.

The *first, White vs. Warf* was brought by taxpayers against the Commissioner of Education and the Quarterly Court.

The *second, Young vs. Warf,* was brought by taxpayers and parents against defendants above plus the County School Board.

The *third, Stewart vs. Ingram,* was brought by taxpayers, parents, and children.

There is no privity between any of the above three groups; and there is no fourth group.

The scope of their representation has never been defined.

There have been petitions by several thousand petitioners in general opposition to the programs and actions of the Commissioner of Education. Copies are lodged with this Court.

In the last paragraph of its Opinion, the Court enjoins Appellants in *this* case *(Stewart vs. Ingram)* and "all persons acting in concert or privity with them" from instituting any further litigation in the courts of this state . . . attempting to challenge the validity of the bond issue. . . ."

Perhaps at the re-hearing it would be appropriate to discuss just who is to be enjoined, and would those enjoined be limited as to choice of counsel? And would they also be enjoined from bringing up questions of unconstitutional administration of the law by the Commissioner of Education, which might deprive citizens of their rights to due process and other basic civil rights; i.e. is the proposed injunction to apply to all citizens of Giles County; for how long, and is it only to the question of referendum?

VI.

This Honorable Court's Opinion affirms the trial court "in all things."

One of the most interesting "things" upon which the trial court based its dismissal was its citation of this Honorable Court's Opinion in *Young vs. Warf,* wherein this Court states that *White vs. Warf* is "res adjudicate" (sic) of *Young,* "although there are some new parties suing in different

capacities, and new conclusory allegations of illegality, these new parties, suing in their different capacities, and the new conclusory allegation of illegality, do not alter the case."

The Chancellor of Giles also refers to "conclusory allegations."

Leaving aside the assumed inconsequence of "new parties" and "new capacities" for the moment, counsel has long been concerned as to just what the Court means by "conclusory allegations." If the Honorable Chief Justice Dyer meant for the word to mean that the allegations were simply conclusions of counsel, then it means nothing since "allegations" are "something to be proven" and, of course, therefore are the results of Plaintiffs' "conclusions."

However, since the phrase seems now to have become conclusive of important rights, it is only proper to assume that the learned Chief Justice used the word "conclusory" in its correct meaning, and that the learned Chancellor was, of course, also aware that "conclusory" means "conclusive."* So Appellants herein are conceded to have made conclusive allegations, which preclude the necessity of proof. However, there must have been some uncertainity in the Court's mind because the Court, having conceded Plaintiffs' allegations as being conclusive, thereupon dismissed Plaintiffs' case.

Plaintiffs request a re-hearing to clarify word usage and meaning.

Plaintiffs also request a reconsideration of the dismissal of their suit for faulty pleading as to "new parties" and "new subject matter" etc., etc.

Plaintiffs have conformed to all requirements of pleadings under T.R.C.P.8.01 which are essentially the same as the Federal Rules of Civil Procedure 8 A.

The U.S. Supreme Court, in *Conally vs. Gibson* 2 Law Ed 2d 80, has definitively stated the requirements of pleading.

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*The word "conclusory" does not even appear in Black's Law Dictionary nor in the Random House Unabridged Dictionary; it is listed as "rare" in Webster's New Unabridged Dictionary and is defined as meaning "conclusive."

At Headnote 4, the Court said:

> "A Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim which should entitle him to relief."

And at Headnote 10:

> "The F.R.C.P. do not require a Claimant to set out in detail the facts upon which he bases his claim but require only a short and plain statement of the claim that will give the Defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests."

And at Headnote 11:

> "The F.R.C.P. reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (Citing *Matz v. Graselli Chemical Company* 303 US 197, 82 L. Ed. 745)

At page 85 of the Opinion, the Court noted that:

> "Simplified 'notice pleading' is made possible by the liberal opportunity for discovery. . . ."

All this applies perfectly to T.R.C.P.

VII.

The Constitution of Tennessee, Article 6, Section 2, provides that "the Supreme Court shall consist of five judges. . . ."

The Appellants herein had the benefit of only four Justices since Justice Henry recused himself because he had formerly represented Defendants as special counsel before this very Court. No replacement was made by appointment of the Governor as required by Article VI, Sec. II, Constitution of Tennessee.

Appellants assert they have a right to a hearing before five

Justices, and where one Justice recuses himself, a substitute must be provided in order for the Court to be properly constituted.

Mr. Justice Henry apparently did not recuse himself on the identical subject matter had in Nashville, March 31, 1976, as a result of which a per curiam opinion was issued that was critical of counsel to the extent that Plaintiffs' case may have suffered unavoidable prejudice before the Chancellor of Lincoln County to whom it was referred. Such stern lectures from our highest Court would not be totally ignored.

Counsel verily believes that Plaintiffs' case has been prejudiced by that Opinion, in which Mr. Justice Henry apparently participated, and their cause has not been heard by a properly constituted Supreme Court of this state.

VIII.

Wherefore Appellants for all the reasons above and each of them seek a re-hearing or hearing on all points of their cause.

Respectfully submitted,

/s/ Jack Kershaw

JACK KERSHAW

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

ALFRED M. STEWART, ET AL,
Appellants

VS.

EARL WAKEFIELD, ET AL,
Appellees

FILED
MAY 5, 1976
RAMSEY LEATHERS
CLERK
SUPREME COURT

GILES EQUITY

ORDER

A petition to rehear has been filed on behalf of the appellants. After consideration of the same, the Court is of the opinion that the petition is not well taken and the same is accordingly overruled at the cost of appellants.

/s/ William J. Harbison
William J. Harbison, Justice

COOPER, C.J., FONES AND
BROCK, J.J., CONCUR
(Justice Henry did not participate)

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

ALFRED M. STEWART, *Et Al,*
Appellants

VS.

EARL WAKEFIELD, *Et Al,*
Appellees

GILES EQUITY

**MOTION FOR LEAVE TO FILE
SECOND PETITION TO RE-HEAR**

Under authority of Rule 32, last paragraph, the Appellants hereby approach one of the Judges of this Honorable Court and respectfully call to the Court's attention that its denial of Appellants Petition to Re-Hear was unsupported by any rationale. The reasons given by Appellants for re-hearing call for an explanation from this Honorable Court in rational terms as to why a re-hearing is denied; Appellants assert this is their right and is a right they must and do now respectfully demand. (*Joint Anti-Facist Refugee Committee vs. McGrath*, 341 U.S. 123). Appellants are particularly concerned to know in what manner and on what grounds this Honorable Court cites as authority for its opinion four (4) cases which do not in any manner deal with the legislative and court history of the statute in question and ignores a definitive case which does.

II.

In addition to the grounds submitted by Appellants in their Petition to Re-Hear, incorporated herein by reference, Appellants call the Court's attention to three (3) factual differences in their cause (Giles County) and the matters in Lincoln or any other county:

1. Appellants as Plaintiffs properly alleged in their Complaint that Commissioner Warf clearly violated the laws of Tennessee by his letter to the Board of Education of Giles County of _____, which is an exhibit to their Complaint.

2. Appellants properly alleged that the County Attorney illegally altered Plaintiffs' Petition for a referendum on a bond issue and changed it to a legally ineffective Petition to change school policy, and this proposition is likewise supported by exhibits. Appellants were thereby denied their rights given them under Article I, Section 1, of the Constitution of Tennessee.

3, Appellants alleged in their Petition that the Giles County School Board was arbitrarily and improperly influenced in its decision by the Commissioner of Education. This is revealed by an official resolution of the school and is made an exhibit to Appellants' Complaint.

These three (3) points apparently were overlooked by this Honorable Court as they would seem to be sufficient grounds to state a cause of action, unless for some reason not stated by this Court *Sanders vs. Carmichael* is precedent for denying fundamental rights to all taxpayers and parents of Tennessee forever.

Respectfully submitted,

/s/ Jack Kershaw

Jack Kershaw
3710 Lealand Lane
Nashville, Tennessee 37204
Attorney for Appellants

May 17, 1976

Judge Wm. Harbison
Supreme Court of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear Judge:

This is written pursuant to your instructions that I list, by letter, the questions which have not been answered by the Court.

1. How can the "Safley" line of cases be an interpretation of a statute which none of them mention? If Safley discusses "subject matter" only, how can this satisfy the requirements of precedent set by Judge Felts in *Harbin vs. Dunn 39 Tenn. Appl. 190.* If the Safley cases interpret 47-201, and its subject matter they make no mention thereof, as shown by Shepherd. (See also *Denny v. Wilson County 198 T 677* and cases cited)

2. Has the Court *ever* given *any* opinion expressing *any* rationale as to whether the 1925 legislation has modified that of 1911? If not, did such modification occur, and under what rationale? (49-701, 1911; 49-201, 1925)

3. "Policy" is presumably not a concern of this Court, but even in a matter of urgent policy why are the concerns of my Clients, who are a considerable portion of the citizenry of Giles and Lincoln Counties, less urgent than the concerns of various elected and non-elected officials? Is it really urgent to build a new consolidated school? Or is it urgent to maintain local community schools?

4. If in re T.C.A. 49-201 this Court states that "shall" is mandatory in *Lamb vs. State* 338 SW² 584, 207 T 162, why is it not mandatory here? If it is mandatory does the County Court have leave to ignore the statute and if so by what authority? By what rational theory?

5. This Court recognized that considerable precedent existed justifying a hearing on the merits for the Taxpayers and Parents of Lincoln County. Is all this precedent destroyed or reversed by *Sanders vs. Carmichael?* Why would a case, sounding in contract, become a precedent for a case which involves the question of standing, or right to sue? Miss Sanders had no contract with the Commissioner of Education; but my Clients don't even claim one with the Commissioner *or* the Quarterly Court *or* the Board of Education so how does Miss Sander's contract suit, and her standing as a person with contract rights, affect taxpayers' and parents' standing, who seek, not a contract, but a declaratory judgment?

6. Is the Commissioner of Education now immune from suit by taxpayers and parents? If so on what theory?

7. Where is the Court's discussion of Commissioner Warf's demand that the School Board of Giles County *exceed* the requirements of the law? (See Commissioner's letter attached as an exhibit to the Complaint)

8. Where is this Court's evaluation of the Resolution of the Giles County School Board which officially charged the Commissioner with co-ercion? Does this Court excuse such conduct? (The School Board Resolution is an exhibit to the Complaint)

9. Does this Court excuse the acts of a County Attorney who consciously manipulated official resolutions in a manner which deprived the thousands of petitioners their rights of petition under Act. I, Sec. 1 of the Tennessee Constitution? If so, upon what rationale? (Exhibit attached to Complaint)

10. The Court's Opinion of April 15, 1976 is based in parton the assumption that the three Giles County cases were promoted as a virtual conspiracy and that some of the "very same individuals" were involved in all 3 cases (11. 16-17 p. 2 of Opinion). Isn't this a question of fact? On which there has been no proof? Has there ever been a declaration as to the scope of representation of appellants? And where for several years great masses of the citizens have been ignored by the Courts would you not expect some of the citizens to keep trying and appear on petitions for relief, which have never been considered? Is there a constitutional limitation as to the number of times different petitioners may repeat and ask questions which remain unanswered? If "some" of the same citizens maintain a continuing interest in the welfare of their children are they to be censured for evil conspiracy?

11. At line 5 page 2 of the Court's April 6, 1976 Opinion the Court says that complainants admit that "their" previous suits have caused delay in bond issues; from that effect (which no one will deny) the Court assumes intent; but when the plain intent was to *permanently* block a bond issue, can this artificially be construed into a attempt to gain temporary and pointless delay? Where is this Courts' explication of this truly revolutionary concept that a result proves an intent? — particularly where those accused of the result states very plainly and honestly what their intent is in the Prayer to their Complaint, and that is generally:

a) "By what authority and how does the Commissioner of Education get all that power and use it so ruthlessly to put our children on busses and ride them all over the county for no remarkable educational results and at great costs?" and

b) "Why can't we vote on a bond issue when the Constitution and the Statutes place that power in the people — particularly when they demand it?"

Is not my adversary's contention that *delay* as my purpose

plainly spurious? With no injunction issued, and if my litigation did not raise *serious* questions *not answered* in previous decisions, couldn't competent bond counsel issue an Opinion that the litigation was trivial and the bond issue lawful? But when these serious questions had not been answered, isn't it clear that no competent bond counsel could make such a certification?

Counsel for State and County complain that the mere filing of my lawsuit prevented the sale of the bonds; this is not true. Could not the County Attorney at any time have asked for an opinion from a qualified bond company attorney? Did the County Attorney do this? If so what was the answer?

The Chancellor of Giles County made a finding that the "only reason for the filing of the Complaint is to delay and obstruct the County Defendants from their lawful purpose of implementing a school reorganization plan for Giles County . . .". This is a factual finding made without a hearing and without testimony. Is this legally a "finding"? Were the taxpayers and parents of Giles County tried in absentia?

12. At line 19 page 2 of the Court's, April 1976 Opinion it is noted that the Chancellor of Giles properly sustained a motion to dismiss for "lack of standing" on the part of taxpayers, parents and children. Why? The requirements to sue, for taxpayers et al in Tennessee are clearly set out in the law. With what rule did my clients not comply? The Court doesn't say and the Chancellor doesn't say. The Chancellor didn't even cite Sanders. He didn't recognize that the same class of citizens (taxpayers and parents) had standing to ask questions of the Court in Lincoln County; why then, not in Giles County? The Chancellor arrives at his conclusion notwithstanding what he calls "conclusory allegations of illegality". What could he possibly be talking about? "Conclusory" means "conclusive" (See Webster's unabridged) If my allegations are conclusive then my Clients need a directed verdict in their favor. Is there any other way to state contentions of *law* except by stating conclusions?

13. The Chancellor in Paragraph 2 of his Order says that he "specifically finds that — all the matters and issues have heretofore been adjudicated in the cases of *Young et al vs. Warf,* and *White et al vs. Warf* and are res judicata." Now without dwelling at length on those cases the Court's own record reveals that the first case didn't even involve parents and that the second case did; and that in the first case the Court said I failed to specifically label a sufficient number of official acts "illegal" though their illegal character was well and plenteously described. In the second case I labeled everything illegal that was illegal and I added new parties Plaintiff (parents) and new parties Defendants (The Giles County School Board). Nevertheless, the Court said my Clients still don't have standing and used the *first case as precedent* for declaring all issues and matters to be res judicata even though neither Opinion *ever* at any time discussed any question except that of "standing"; there was no discussion of failing to state a cause of action; so I most humbly ask where is the authority, the precedent, for declaring a case res judicata to all issues and matters where the only question discussed has been that of "standing"? And "standing" of Taxpayers only, not Parents?

14. The Chancellor of Giles County makes much of the fact that an appeal bond which I filed in the White case contained a clerical error, not mine (See Clerk and Masters affidavit); as a result the Appeal was dismissed *upon the insistence of the County Attorney* and he persisted even upon my informing him that I would be forced to take a Writ of Error if he insisted on dismissal for an insignificant clerical omission (the amount of the bond was not filled in by the Clerk). I informed him that I would have to have several months to perfect the Writ because I had very important previous committments. The County Attorney insisted on his little technical advantage knowing full well that the results would be delay. The Chancellor however speculates that this is sure proof that

I delayed the ultimate appeal for 7 months. Not only is this pure speculation but it is mistaken. Now I have always admired your sense of fairness and your willingness to listen — does this situation really seem to you to prove that I was merely delaying? Does not my very persistence in seeking valid answers to valid questions indicate quite the contrary? Would it not be most reasonable to speculate in the other direction and consider that the County Attorney and his Clients thought that they would simply wear me and my citizen Clients down? And that they sought to do this because it was perfectly clear that from the number of signaturories on petitions that it was likely that if the school bond issue were ever put to a vote, the school officials and the appointed bureaucrats might lose the election? The obvious conclusion, is, is it not, that the establishment is afraid of the people's vote on certain issues? Otherwise why this frantic fanatical determination to deny the ballot?

15. The foregoing theory of the state of mind of opposing counsel and those whom they serve is borne out by several most remarkable documents one of which contains the startling suggestion that this Court convene itself as a Trial Court to try me and my Clients for obstructing "public business".

I refer first however to a petition filed by former Attorney General Henry Haile, the thrust of which was to condemn me for remarking to my Clients that "we had lost the battle but won the war . . .". A phrase which alluded to the fact that even though "White" had been dismissed, still the consolidated school, in the opinion of the County Attorney, could not be built because a new suit was pending which prevented the sale of the bonds.

Haile made this charge in all seriousness in open Court, in the Supreme Court of Tennessee. Since it was hearsay, and improper testimony in an Appellate Court and irrelevant I didn't bother to answer it. Actually, if honest, Haile should

have quoted my entire remark which was, "We have lost the battle but won the war, for the moment - but it is my intention to win both the battle and the war."

This was a most logical remark to make to my Clients since we were discussing what to do next at the time. The remark got in the newspapers since my discussions with Clients, who number in the thousands, had to be something of a public event, and at any rate I had nothing to conceal.

Amazingly the Court, particularly Judge Henry took this "charge" of Haile's most seriously and rendered the famous lecture decision of March '75. Since the net result at the hearing was that I should get a hearing on the merits in Lincoln County I was not particularly bothered by Haile's histrionics at the time. I was annoyed later at the written Opinion which I felt, and feel now could very well have prejudiced the Chancellor of Lincoln against me. Haile even went so far that he averred that I was not competent to represent the people of Lincoln.

The second document, which I find to be filled with some degree of hysteria is the Petition filed in this Court by Deputy Attorney General Cooney in which he concludes that my sole purpose was to "obstruct and delay" and then attempted to convene the Supreme Court into a Trial Court to try me and the citizens of Giles County who didn't agree with the Commissioner of Education.

The Prayer of this creation is so remarkable I'll quote to you here in full:

a) That this Honorable Court, acting under its statutory supervisory powers, take immediate jurisdiction of this matter.

b) That a hearing be held at the earliest practicable date to hear this matter on its merits.

c) That at said hearing, this Honorable Court direct the summary dismissal of this action with costs to be taxed to the plaintiffs.

d) That on the hearing of this cause this Honorable Court issue a permanent restraining order, restraining the plaintiffs and all those in concert with them in Giles County and Jack Kershaw, plaintiff's attorney or any other attorney for and on behalf of the plaintiffs and all those in concert with them in Giles County from filing any further actien or proceedings whatsoever to prevent, thwart, delay or otherwise obstruct the County defendants from implementing the school plan adopted and funded and the transaction of public business.

e) That petitioner have such other, further, different, and

The purpose of this document and the Haile performance was to win the states lawsuit by blocking its Citizens from their day in Court and discrediting their lawyer; and has this tactic succeeded? You sincerely believed at the time that my sole purpose in bringing up all those questions was simply to block a bond issue? You must have, since you referred me and my ardor to the disciplinary committee, but on having had a little time to reflect does it now seem possible to you that a lawyer might be genuinely interested in the several constitutional questions raised without, as Mr. Cooney charged, being "malicious"? Could it be that Mr. Cooney and Mr. Haile might be, if not "malicious", at least shall we say "unfriendly" toward such a lawyer who, by their lights, was blocking progress?

If the state had faith in its *legal* position why not let the matter come on for trial? The only rational answer is that our public officials, elected and appointed, don't have faith in the people or parents and don't want them to have much real say-so in education, and indeed the guidance of their children. But is this not apparent? Do you now unreservedly and actually believe that the sole purpose of my action was to block a bond issue "oppressively"? Surely I had more important questions than that for the Court to consider.

I brought up constitutional questions for mature consideration; the procedure was turned by my opponents

into a mere power struggle.

16. I had no idea our agreement that an informal letter outlining unanswered questions would be quite this long, but there remains to consider at least one other question and this is the Per Curiam Opinion of March 1975 which curiously grants most of everything I had been asking (i.e. a trial on the merits) but by its somewhat bombastic style lectures me so sternly that I am sure that the poor Chancellor of Lincoln County thought the Court had released an ogre to descend upon him. I am pleased to say that considering the introduction the Court gave me we got along pleasantly except there were, if only now and then, clear indications that he had read the Court's lecture.

Why didn't Judge Henry recuse himself from participating in that Opinion as he did in Jackson? Nothing had changed. He was and is a former advo ;e in the Giles County case and a very formidable and able one and his style is quite apparent in the March '75 Opinion. Did he remember then that he has been special counsel for Giles County in *Young vs. Warf*? Why fail to recuse himself in Nashville, but do so (on his own motion) in Jackson?

17. After Judge Henry recused himself in Jackson why was not a Special Judge appointed to sit in his place as required by law?

These are most if not all the questions the Court might consider on re-hearing. There is the question of what happened to the fine and glorious language of the Constitution of Tennessee.

ARTICLE I, SEC. 1. All power inherent in the people-Government under their control. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, and unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

ARTICLE I, Sec. 2. Doctrine of nonresistance condemned—that government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

ARTICLE I, SEC. 8. No man to be disturbed but by Law.- That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

ARTICLE XI, SEC. 17. County Offices- No County office created by the Legislature shall be filled otherwise than by the people or the County Court.

(The Editor states that- The provision in this section was doubtless incorporated into the Constitution of 1870 on account of the condition of the government existing at the time of the meeting of the constitutional convention, and just prior thereto, and to insure against the repetition of such condition, which was caused by the affliction of an orgie of commissioners appointed from Nashville, many of them hostile in sentiment and conduct to the people over whom they were set.)

Thank you for allowing me to write this informal letter to you.

Respectfully yours,

/s/ Jack Kershaw

Jack Kershaw

cc: representative Clients

SUPREME COURT, NASHVILLE

ALFRED M. STEWART, *Et Al*	FILED MAY 27, 1976 RAMSEY LEATHERS CLERK SUPREME COURT
	Giles Equity
VS.	Application to file Second Petition to Rehear Denied.
EARL WAKEFIELD, *Et Al*	

ORDER

Upon consideration of the appellants' application for leave to file second petition to rehear in this cause, the Court is of opinion that same should be denied; and it is accordingly so ORDERED.

ENTER, this the *19th* day of May, 1976.

FOR THE COURT:

/s/ William J. Harbison

JUSTICE

This entry is made *nunc pro tunc*, same having been rendered on the 19th day of May, 1976, and is entered now for then. 5/27/76.

Supreme Court, U. S.
FILED
AUG 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-117

EDWARD MITCHELL, et al.,
Petitioners,

v.

BENJAMIN E. CARMICHAEL, Commissioner of Education of the State of Tennessee, et al.,
Respondents,

and

EDWARD MITCHELL, et al.,
Petitioners,

v.

JUDGE TAYLOR CRAWFORD, et al.,
Respondents.

Petition for Writs of Certiorari to the Supreme Court of Tennessee and to the Court of Appeals of Tennessee

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Cases	3
Argument	4
The Supreme Court of the United States Lacks Jurisdiction to Hear This Case Because the Decisions of the Supreme Court of Tennessee and the Court of Appeals of Tennessee Were Based Solely Upon Interpretations of the Laws of the State of Tennessee and Not Upon Federally Guaranteed Constitutional or Statutory Rights	4
Conclusion	5

TABLE OF CITATIONS

Cases

Adams v. State ex rel. Chattanooga Coke and Chemicals, 415 S.W.2d 424 (Tenn. 1974)	4
Mitchell v. Carmichael, 422 S.W.2d 869 (1975)	1, 3, 4
Sanders v. Carmichael, 527 S.W.2d 92 (Tenn. 1975)	4
State v. Safely, 172 Tenn. 385, 112 S.W.2d 831 (1938)	4
Wood v. Chesborough, 228 U.S. 672 (1913)	5

Statute

28 U.S.C. § 1257(3)	2

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OPINIONS BELOW

The opinion of the Supreme Court of Tennessee in *Edward Mitchell v. Benjamin E. Carmichael* is unreported and is included in petitioners' appendix at B-79. The opinion of the Court

of Appeals of Tennessee in *Edward Mitchell v. Judge Taylor Crawford* is unreported and is included in petitioners' appendix at B-82.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Supreme Court of the United States has jurisdiction to review decisions of the Supreme Court of Tennessee and the Court of Appeals of Tennessee which were based solely upon the statutes and common law of the State of Tennessee.

STATUTORY PROVISIONS INVOLVED

Respondents' assertion that the Supreme Court of the United States has no jurisdiction to review the decisions of the Supreme Court and Court of Appeals of Tennessee rests upon 28 U.S.C. § 1257(3) which provides that:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

The issues involved in these cases have been litigated since June, 1970 when counsel for plaintiffs first challenged the ability of a Tennessee county court to issue educational bonds without referendum. App. B-1, B-27. The two cases now before the Court were initiated in 1974. App. B-49, B-81. Both cases sought to raise the same question of the validity of school bonds issued under the provisions of T.C.A. § 49-701 *et seq.* even though one was filed in Davidson County, Tennessee (Nashville) and the other in Lincoln County, Tennessee (Fayetteville).

The county defendants were dismissed from the Davidson County case for lack of subject matter jurisdiction over them in the Chancery Court of Davidson County. An interlocutory appeal was attempted. In *Mitchell v. Carmichael*, 522 S.W.2d 869 (Tenn. 1975), App. B-74, the case was remanded to the Chancery Court of Davidson County.

In the meantime, plaintiffs filed suit in Lincoln County. A hearing on the merits of that case was held and judgment rendered in favor of respondents. The case was appealed to the Court of Appeals for the Middle Section of Tennessee. The Court of Appeals held that the bond issue was a valid issue without referendum. The Court also found Tennessee's educational statutes constitutional. App. B-82. The Supreme Court of Tennessee denied the petition for a writ of certiorari. App. B-97.

Plaintiffs perfected an appeal from the final dismissal of their Davidson County case and the Supreme Court of Tennessee held that plaintiffs were without standing to challenge the actions of the state educational officials. App. B-79. The Supreme Court also took note of the fact that the bond issue has been two years delayed because of the present litigation.

Petitioners now ask this Court to review the decisions of the Supreme Court and Court of Appeals of Tennessee.

ARGUMENT

The Supreme Court of the United States Lacks Jurisdiction to Hear This Case Because the Decisions of the Supreme Court of Tennessee and the Court of Appeals of Tennessee Were Based Solely Upon Interpretations of the Laws of the State of Tennessee and Not Upon Federally Guaranteed Constitutional or Statutory Rights.

The decision of the Supreme Court of Tennessee in *Mitchell v. Carmichael* is based solely upon two concepts of state law. First, the Court determined that plaintiffs had no standing to sue state officials. *Sanders v. Carmichael*, 527 S.W.2d 92 (Tenn. 1975). Second, the Court implicitly reiterated that venue in suits against local officials is not transitory and that such suits must be brought in the county where the officials reside. *Adams v. State ex rel. Chattanooga Coke and Chemicals*, 415 S.W.2d 424 (Tenn. 1974). The decision is based solely upon these considerations which are strictly matters of interpretation of the laws of Tennessee.

The decision of the Court of Appeals in *Mitchell v. Crawford* is based primarily upon the interpretation of the state statutes governing the issuance of school bonds by county courts, the governmental agencies of Tennessee counties. The Court of Appeals interpreted and applied the case of *State v. Safley*, 172 Tenn. 385, 112 S.W.2d 831 (1938). The Court also found that the bond issuance statutes and the educational statutes were constitutional. The Court did not rely upon federal statutes or the federal constitution in rendering its decision.

As the courts in Tennessee have not relied upon federal grounds in finding for respondents, neither have petitioners in this case asserted any substantial federal claim which would be subject to interpretation by the Supreme Court of the United States.

Petitioner simply asks the Supreme Court of the United States to review the interpretation of state law by the courts of Tennessee and to substitute its judgment for the judgment and interpretation of the courts of Tennessee. Petitioner asks that the United States Supreme Court review the concepts of standing, subject matter jurisdiction, the precedential value of cases, the ability of a state Supreme Court justice to hear cases, and appellate procedure. These are questions of state law.

No issues of federal law were decided by the Tennessee courts nor have any been raised by petitioners. The state law basis for the courts' decisions are independent of federal law and are adequate to support the decisions of the Tennessee courts. Therefore, the Supreme Court of the United States is without jurisdiction to review the decisions of the Supreme Court and Court of Appeals of Tennessee. *Wood v. Chesborough*, 228 U.S. 672 (1913).

CONCLUSION

Because the decisions of the Supreme Court and Court of Appeals of Tennessee were based solely upon Tennessee law, the petition for writs of certiorari should be denied.

Respectfully submitted,

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